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1893.

THE

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Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1893.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

JUDGES
OF
THE COURT OF APPEAL.

1893.

Lord Herschell, Lord Chancellor.

Lord Coleridge, Lord Chief Justice of England.

Lord Esher, Master of the Rolls.

Sir Francis Henry Jeune, President of the Probate, Divorce and Admiralty Division.

Sir Nathaniel Lindley,
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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1892. 1893.

COLLINS AND TUFFLEY *v.* ELSTONE.

1892
Oct. 27.

Probate—Will—Revocation—Misapprehension.

A testatrix left two wills, and a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that as it only related to the insurance policy the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance the testatrix duly executed the will:—]

Held, on the authority of *Morrell* v. *Morrell* (7 P. D. 68), that the testatrix must be taken to have known and approved of these words of revocation, and that they must be included in the probate of the last will.

APPLICATION for probate.

Sarah Caroline Pinney, deceased, late of Belvedere, in the county of Kent, died March 9, 1891, leaving a will dated March 12, 1875; a codicil thereto dated July 21, 1885; and a will dated October 17, 1889, all duly executed.

1892

COLLINS
v.
ELSTONE.

The plaintiffs, who were the executors of all three testamentary papers, propounded them, but prayed that certain words of revocation contained in the last will might be omitted from the probate, as having been inserted by mistake and without the knowledge and approval of the deceased.

The defendant, Caroline Elstone, a cousin, and one of the next of kin of the deceased, opposed the grant of probate of the first two papers, and prayed for probate of the will of October 17, 1889, as it stood without the omission of the revocatory words.

The case was tried before the President without a jury.

It appeared from the evidence of the witnesses that the deceased and Miss Collins, one of the plaintiffs, were two maiden ladies, who for thirty years had lived together at Belvedere, in the county of Kent. They joined their incomes together, and had agreed to make mutual testamentary dispositions, with the view of securing to the survivor of them whatever the first who died might possess at the time of her death.

In pursuance of this arrangement Miss Pinney, the deceased, duly executed the will of 1875 and the codicil of 1885, which secured to Miss Collins a life interest in deceased's property, amounting to something under 300*l.*

Shortly before her death it occurred to Miss Pinney that if she died first Miss Collins might be in want of ready money to defray her testamentary and funeral expenses; and in order to provide this she insured her life for 50*l.* The other plaintiff, Mr. Tuffley, acted for her in effecting this insurance, and the deceased asked him to draw a will by which 30*l.* would be secured to Miss Collins, 10*l.* to Mr. Tuffley's mother, and 10*l.* to a clergyman. Accordingly, Tuffley procured a printed form, and filled it up to carry out the wishes of Miss Pinney.

At the commencement of this form were the words: "I hereby revoke all wills by me at any time heretofore made"; and it appeared that the testatrix, when these words were read over to her, at once objected to them, saying that if they revoked the will and codicil which she had already made in 1875 and 1885, she would not sign it, as she did not wish to alter the provision she had made for Miss Collins. Mr. Tuffley told her —and he swore that this was his honest belief at the time—

that as the will she was then making referred only to the insurance money, and did not alter the provision she had made for Miss Collins by the previous will and codicil, these words would not have the effect of revoking those testamentary papers, and that to strike these words out of the form might make the whole will invalid. The testatrix made no further objection, but signed the will as it stood.

B. Deane, for the plaintiffs. The testatrix cannot be said to have known and approved of these words, and though Mr. Tuffley did not intend to deceive the testatrix, yet his misrepresentation may be said to have amounted to legal fraud. Probate may be granted of the three papers with the words of revocation omitted from the last as together constituting the last will of the deceased. [He referred to *Guardhouse* v. *Blackburn* (1), *Atter* v. *Atkinson* (2), and *Fulton* v. *Andrew*. (3)]

Bray, for the defendant. *Morrell* v. *Morrell* (4) is an authority for the proposition that where it is shewn that words appearing in a will have been read over to a testator, and that he has executed the will with those words contained in it, he must be taken to have known and approved of them, and the Court must hold them to form part of the will.

THE PRESIDENT. I cannot help regretting—as I suppose everybody would regret—that I am compelled to come to a conclusion the effect of which I am conscious will be that the real intentions of the testatrix will not be carried out. But on the facts of the case the conclusion is quite clear. The last will contains words which in law revoke all previous wills. Those words were inserted, as I have no doubt, because the testatrix misunderstood their meaning, and I have no doubt how she came to misunderstand their meaning. It is clear on the evidence that the person who drew the will was ignorant—there is no fraud—as to the effect of putting that clause in, and doubly ignorant; for he told her it would be inoperative, and he told her further, if it was struck out the rest of the will would be

(1) Law Rep. 1 P. & D. 109.
(2) Law Rep. 1 P. & D. 665.
(3) Law Rep. 7 H. L. 448.
(4) 7 P. D. 68.

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vitiated. Misinformed by this statement, she allowed the clause to remain. The question is, Under these circumstances, can I strike it out consistently with the authorities? I am afraid I cannot. There are three cases to which I have been referred. The first is the case of *Guardhouse* v. *Blackburn* (1), where Lord Penzance's words lay down a canon which no doubt completely covers this case, because Lord Penzance says that, subject to a question of fraud, the fact that a will has been read over to a capable testator on the occasion of its execution, or its contents brought to the testator's notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved of as well as knew the contents. Then there is the case of *Atter* v. *Atkinson* (2), to which I need not refer further, because Lord Penzance's view of the law is fully expressed in the case of *Guardhouse* v. *Blackburn* (1). The case of *Guardhouse* v. *Blackburn* (1) is commented on in *Fulton* v. *Andrew* (3); but I do not think that any material difference with it was expressed. All that the Lord Chancellor seems to me to have pointed out is, that when that case was left to the jury it was not clear that the jury did not believe then that there was some fraud with regard to the inserton of the particular clause, or that they were satisfied that it was read over so that it was fully before the mind of the testator. Therefore, I do not think that on these cases I should strike out these words. Then Mr. Bray refers me to the case of *Morrell* v. *Morrell* (4), and it seems to me that the language used in that case expresses the law which is applicable to this case, and expresses what is some reason for it, because the view of Lord Hannen in that case is this, that if a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself. Now, that view appears to me exactly to meet the present case. This lady thought it right to employ this gentleman to make her will for her; she thought it right to trust to him. No doubt he was mistaken; but, according to the view of Lord Hannen, his mistake was her mistake. For a moment I felt some doubt as to whether it might not be possible to extend the doctrine of fraud so as to include this mistake. But I am afraid there is no authority to make such an extension. There is, of course, a distinction between fraud and anything else; and taking the view of Lord Hannen, which I have just referred to, it seems to me that where there is the interposition of fraud between the principal and agent, it may be, to follow out Lord Hannen's view, that the agency is thereby rendered invalid, and that the person is not bound by the act of the agent. Under those circumstances, I feel bound to say that I am unable to strike these words out of the will, and probate will go of the will of October 17, 1889, with these words of revocation included. The will of 1875, with the codicil of 1885, will not be admitted to probate. The costs of all parties out of the estate.

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(1) Law Rep. 1 P. & D. 109.

(2) Law Rep. 1 P. & D. 665.

(3) Law Rep. 7 H. L. 448.

(4) 7 P. D. 68.

Solicitors for the plaintiff: *West, King, Adams & Co.*
Solicitors for the defendant: *Freshfields & Williams.*

W. L.

WYATT AND BERRY v. BERRY AND OTHERS.

1892
Oct. 31;
Nov. 2.

Probate—Will—Due Execution—1 Vict. c. 26, s. 9.

The two attesting witnesses to a will were father and son, both working at the same workshop, but on different floors. The testator produced his will first to the father alone, and, telling him it was his will, asked him to witness it. The testator's signature was already on the will, and the father signed it. The testator then asked that the son, who was working on the floor below, should be called in, and when he came in asked him to witness the paper, saying, in answer to questions, "It is a bit of ordering of my affairs. I have signed it, and your father has signed it." The son then signed the will, all three being present:—

Held, that the will was not duly executed in accordance with the requirements of 1 Vict. c. 26, s. 9.

APPLICATION for probate.

The plaintiff propounded as executor the last will, dated March 28, 1890, of Thomas Berry, deceased, late of New Mills, in the county of Derby, who died April 9, 1890.

The defendants, the next of kin of the deceased, opposed probate, and pleaded that the testator was not of sound mind at the time of the execution of the will, and that it was not duly executed according to the provisions of the statute. The first plea, however, was not insisted on, and the only question in the case was whether the will had been duly executed.

The case was heard before Gorell Barnes, J., without a jury.

The will was entirely in the testator's handwriting, and the attestation clause was in the following form: "Signed by the testator, and acknowledged by him to be his last will and testament, in the presence of us, present at the same time, and subscribed by us in the presence of the said testator and of each other."

Both the attesting witnesses, John Hudson, a joiner and builder of New Mills, and his son, Charles Hudson, were examined, and related the circumstances attending the attestation.

John Hudson said: "On the day on which the will was executed, some time in the morning before dinner, I was in my workshop, and my son was in the room below. The testator came in to pay an account, and after that he went into my office, which is in a corner of the workshop, and asked me to come in. He was unfolding a paper on the desk, and he said, 'I want you to be a witness to this.' I said, 'What is it—is it your will?' He said, 'It is. I have signed it, and I want you to sign it underneath.' I signed it, and then he said, 'Where is Charlie? I want him to sign it.' I fetched my son from the room below, and when he came in we were all three in the room together. The testator said to my son, 'I want you to be a witness to this here.' My son said, 'What is it?' and he replied, 'It is a bit of ordering of my affairs.' Charles then signed it in our presence. I saw the signature of the testator, and the attestation clause when I signed."

Charles Hudson said: "I was in the room down below, and when my father fetched me up into the office the testator said to me, 'I want you to sign this' (pointing to the paper). I said, 'What is it?' and he said, 'It is a bit of ordering of my affairs.' He put his finger on the paper and said, 'I have signed it, and your father has signed it. You sign here.' I did so. We were all three together in the office, and I saw testator's signature and my father's signature there when I signed."

Both witnesses had made affidavits when the will was taken into the district registry for probate in common form which did not differ in any material respect from their evidence.

Searle, for the plaintiffs. No doubt if the facts were as stated by the attesting witnesses the requirements of the statute have not been complied with; but when it is considered that the will is in due form on the face of it, the case may be held to be one of those in which the Court, without doubting the good faith of the witnesses, may come to the conclusion that their recollection is not accurate, and may presume that everything was rightly done. [He referred to *Wright* v. *Sanderson* (1), *Loyd* v. *Roberts* (2), and *Woodhouse* v. *Balfour*. (3)]

B. Deane, for the defendant. What was done in the present case cannot be taken to be a compliance with the statute. The case falls exactly within the principle of *Hindmarsh* v. *Charlton* (4), where it was held that the signature or acknowledgment must be in the presence of both the attesting witnesses both present at the same time before they sign.

Cur. adv. vult.

GORELL BARNES, J. In this case the plaintiffs are the executors of the will of the late Thomas Berry of New Mills, county of Derby, retired farmer, who died on April 9, 1891, the will being dated March 28, 1890. It is propounded by the executors, and the defendants, in their defence, raise two points—namely, that the will is not executed according to the provisions of the Wills Act, the 1st Vict. c. 26, and also that the deceased was not of sound mind at the time the document was executed. This latter point was not, however, urged before me, and the only point for me to decide is whether the will was properly executed according to the provisions of the statute. The will is signed by Thomas Berry himself as testator, and by John Hudson and Charles Hudson as attesting witnesses. Looking at the will itself, all matters necessary to be complied with would appear to be in proper form; but it seems that, when it was

(1) 9 P. D. 149.
(2) 12 Moo. P. C. 158.
(3) 13 P. D. 2.
(4) 8 H. L. C. 160.

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presented for probate in common form, the registrar, owing to certain appearances about it in other respects, raised a difficulty as to granting it probate without having affidavits from the two attesting witnesses. They accordingly made affidavits, and on these arose the point which I am called on to decide, and that is whether the will is duly executed, inasmuch as the testator acknowledged it first in presence of one witness, who attested his signature, the other witness not being then present, this latter witness being afterwards called in and signing his name in presence of the testator and of the first witness. On these facts, if they be accurate, the case would fall within the principle of two decisions, to one of which I was referred in the course of the arguments. One of them is the case of *Moore* v. *King* (1), and the other is *Hindmarsh* v. *Charlton* (2), to both of which cases the one before me now is substantially similar. In the first of them the will had been signed by the testator in presence of his sister, who attested it, and on a subsequent day, when both the testator and his sister were present, the testator requested another person to sign it, his own signature and that of his sister being acknowledged at the time. By the way, the document was a codicil and not a will, but that makes no difference. In that case Sir Herbert Jenner Fust said, at p. 253: "I am inclined to think the Act is not complied with unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time. If the one witness has previously subscribed the paper and merely points out her signature when the testator acknowledges his signature in her presence and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient." Without referring in detail to *Hindmarsh* v. *Charlton* (2), I may say it is to the same effect, and the only difference between those two cases and the present one is that the interval of time in this case is shorter. In the first of those two cases the interval between the signing by the first witness and by the second was some days. In the second that interval was from morning till afternoon; but in the present case it was only a few moments. In view of those two cases, Mr. Searle admitted that if the facts were such as described in this case by the attesting witnesses in their affidavits and in their oral evidence, the will could not stand; but he asked me to uphold it on the ground that, as the will itself appears to be in proper form and duly executed in all respects, I might hold that it was properly executed, notwithstanding the testimony of the attesting witnesses, if I did not feel certain that their memory could be relied upon. He referred me to *Wright* v. *Sanderson* (1) and *Loyd* v. *Roberts* (2), which cases shew clearly that where it is obvious that the testator meant the document to be his will, and thought he was complying with the Act of Parliament, the Court would presume that everything was right, and would not tie itself down to accept the evidence of the witnesses to the contrary. The bearing of those two cases appears to me to be quite clear. They really go to this—that where there is any doubt about the recollection of the attesting witnesses, where there is anything from which the Court can fairly say that the will ought to be held to be good, and that the recollection of the attesting witnesses ought not to be relied on as against the will, the Court may say that it is satisfied that the will was duly executed. But the difficulty in this case arises from the distinct and positive evidence which the attesting witnesses have given. They were both called, and, knowing the point which would arise, I watched them with great care. They seemed to me to be both very intelligent men, and they shewed no hesitation when questioned as to their recollection of what had occurred in respect of the will. It must be borne in mind that the case is not one in which there is something on the face of the document which would shew that those witnesses cannot be quite accurate in their recollection—for instance, as in a case where a witness says there was no writing on the paper when he signed, whereas the internal evidence shewed that there must have been—because the single point to which they speak is that to which their attention must have been drawn, and that was the circumstances in which they affixed their own signatures. [The learned judge read the evidence of the two attesting witnesses, and proceeded:—] Now, the evidence of those two witnesses is on

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(1) 3 Curt. Ecc. 243.

(2) 8 H. L. C. 160.

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(1) 9 P. D. 149.

(2) 12 Moo. P. C. 158.

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the same lines as that in the two cases to which I have referred, and I am sorry to say I must accept it. If I felt any doubt, or saw any reason to believe that the Hudsons were not accurate, my view would be the other way. But, unfortunately, the recollection of those two witnesses is too good for that. I have gone carefully through the affidavits made by them when objection was first made in the registry to the granting of probate, and I find that the contents of those affidavits are in their details completely in accord with the evidence which the two witnesses have given in court. It appears to me that, for the reasons I have stated, their evidence must be accepted by me. It is, of course, regrettable that where it is obvious the testator wished this to be his last will, and thought he was making it in compliance with the Act of Parliament, I should feel obliged to refuse probate of it. But, as was pointed out by the judges in the House of Lords case, they were bound, and I am bound, by the provisions of the Act of Parliament. These must be complied with. Therefore, though I do it reluctantly, I must pronounce against this will as being invalid. I think, however, that the case is one in which the costs of all parties should come out of the estate, and I so order.

Solicitors for the plaintiff: *Gibson & Weldon.*

Solicitors for the defendants: *Robbins, Billing & Co.*

W. L.

THOMPSON *v.* ROURKE.

1892
Nov. 18, 19, 21.

Jactitation of Marriage.

At the hearing of a suit of jactitation of marriage brought by the supposed wife, Gorell Barnes, J., left the following questions to the jury—first, was there a legal marriage between the petitioner and respondent; and secondly, had the petitioner acquiesced in the representation of the respondent that she was his wife.

The jury disagreed on the first question; but they found that the petitioner had allowed herself to be represented as the respondent's wife:—

Held, that, upon this finding the petition must be dismissed.

THIS was a suit of jactitation of marriage.

The petitioner described herself as Eleanor Gordon Thompson, of 79, Victoria Street, Pimlico, and her petition was as follows:—

"1. That Arthur Henry Rourke, of 25, Hill Street, Walworth, in the county of Surrey, did in and since the month of August, 1890, at 38, Bessborough Place, Pimlico, and at divers other places, wilfully, and without the assent of your petitioner, boast and assert that he was the husband of your petitioner.

"2. That the said Arthur Henry Rourke is in no wise the husband of your petitioner, nor was he at the time of such boasting.

"3. That the said Arthur Henry Rourke refuses to desist from boasting that he is the husband of your petitioner.

"4. Your petitioner, therefore, prays that your Lordship will be pleased to order that the said Arthur Henry Rourke do cease and desist from such boasting, and that he be enjoined perpetual silence in the premises, and that your Lordship will make such further orders in the premises as to your Lordship may seem meet."

The respondent, Arthur Henry Rourke, in his answer, denied the allegations in the petition, stated that the petitioner was his lawful wife, having been married to him on October 3, 1876, at Melbourne, in the colony of Victoria, and prayed that the petition be dismissed.

The case was tried before Gorell Barnes, J., and a common jury.

Both parties appeared in person.

The petitioner, in her evidence, gave the following account of her relations with the respondent. She met him first, she said, in 1874, when she was seventeen years of age, at Melbourne, in the bar-parlour of an hotel which was kept by her mother. He was then passing under the name of Rourke. She met him next in 1876, when he was lodging with her aunt. They became intimate, and the result was that a child was born, which died when it was a few months old, and was buried at Melbourne. She never went through any ceremony of marriage with him. In 1877 she went to Sydney, and in 1878 she came to England. In 1878 she gave birth to a son, and in 1881 to a daughter; but the respondent was not the father of either. They were the children of one Arthur Herbert Thompson, who had been a bank clerk at Sydney. She did not know what had become of him. [Asked whether she was married to him, she said there had not been a legal marriage, and that she was not a married woman.] She met the respondent again at a railway station in London, when she was living in Camden Town. He found out where she was lodging, and came to her. He wanted to borrow money from her. She lived at various lodgings in the north and east of London, and the respondent occasionally came to see her—sometimes staying all night—but occupying a separate room, and she never cohabited with him. In 1883 the respondent took a house and she removed her furniture to it. He had a separate room, and occupied it occasionally. On the same footing they lived in various places, where she passed under the name of Thompson; and in 1884 he wished to marry her, and got a licence; but she refused. In the affidavit which he had to make he described himself as a bachelor. In 1889 she went to America, leaving her children in the care of the respondent's sister; and on her return she had made many attempts to obtain possession of them, but had failed.

In cross-examination, she admitted that in various applications at the police court she had given her name as Rourke, and that she had so given that name when bail had been given for her on one occasion; but the responsibility for this she attributed to the respondent.

The respondent also gave evidence, and stated that he met the petitioner at the Royal Derby Hotel, Melbourne, where she was living with her mother and sister. After the mother's death there was a dispute about the property, in which he became involved, and the result was that he and the petitioner were married on October 3, 1876, at a registry office in Melbourne. There were two witnesses, whom he paid, but he did not know who they were; and there was a certificate, which he believed was in the possession of his wife. He was then passing under the name of Thompson, and he produced a copy of the burial certificate of the child, which was in the name of Thompson. At that time he was entirely dependent for support on his friends in England; and in 1878 he returned to England in the ship *Essex*. It was arranged between himself and the petitioner that she should remain in the colony; but she followed him in the next ship, and found him out in London. Owing to his mother being in a critical state of health, he did not inform his family of his marriage. He lived with the petitioner at various places, dividing his time between her house and his father's, in order to conceal the fact of his marriage. He lived with her always as her husband, and he was the father of her two children. They passed under the name of Thompson until his mother died, when he acknowledged his marriage and introduced his wife to his family. After that they lived in his own name of Rourke. As to the offer of marriage alleged to have been made in 1884, he explained that he and his wife were then thinking of emigrating to Queensland, where, to obtain a grant of land, it was indispensable that they should not have been to the colonies before, and as their original marriage certificate would have revealed the fact that they had been in Melbourne, he proposed that they should go through a second ceremony of marriage.

A house agent and several lodging-house keepers were examined, who stated that they had let lodgings to the respondent, which were occupied by him and the petitioner passing under the name of Mr. and Mrs. Thompson, and two of the respondent's brothers stated that the respondent had applied to them at various times as Mrs. Rourke. There was also evidence that when she had become an inmate of Islington Workhouse on one occasion she had given her name as Mrs. Rourke.

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GORELL BARNES, J., in charging the jury, after reviewing the evidence, said: There are two questions for you to decide—first, whether the petitioner and co-respondent were married at Melbourne on October 3, 1876; and, secondly, whether the petitioner has since the year 1876 acquiesced in the boasting of the respondent that he was her husband; or, in other words, has she allowed herself to be represented as his wife? If your decision on either of these questions be in the affirmative, in my opinion, that would be a sufficient defence to the petition. But it is not absolutely necessary that you should determine the first question, because, in my judgment, if the second question were found in favour of the respondent, that would be sufficient to defeat the object of the petitioner. Such a verdict on the second question would still leave the fact of the marriage open; but it would deprive the petitioner of her right to this particular remedy.

The jury disagreed on the first question; and on the second, they found that the petitioner had acquiesced in the representations of the respondent that he was her husband.

GORELL BARNES, J. On that finding, I dismiss the petition.

W. L.

1892
Nov. 15.

IN THE GOODS OF ANDREWS.

Probate—Will—Dependent Relative Revocation—Grant of Probate refused on Motion.

A testator executed two wills, one in 1872 and the other in 1892. By the first he left all his property to his wife, and by the second he made no provision for her. Shortly before his death he asked that the two wills might be brought to him, and directed his wife to burn the later will, which she did, and he then handed to her the earlier will, saying, "Now you will be mistress of all."

After his death letters of administration were granted to his widow, upon the assumption that the destruction of the will of 1892 which revoked all previous wills, had caused an intestacy:—

Held, that, inasmuch as there were infants interested under the earlier will who could not consent, the Court would not revoke the letters of administration and grant probate of the later will on motion, but would require such will to be propounded.

JOHN ANDREWS, deceased, late of Mellis, Suffolk, died on February 26, 1892. On February 3, being then ill in bed, he sent for his solicitor, and directed him to prepare a fresh will, which he duly executed on the same day. By this will he revoked all previous testamentary dispositions, and, after giving legacies of 100*l.* each to his brothers and sisters, bequeathed the residue in trust for the benefit of the only son of his wife's daughter. By a will executed on February 5, 1872, the testator had bequeathed the whole of his real and personal estate to his wife, Hannah Andrews, with the exception of an annuity to a brother, and had appointed her his sole executrix. This will was produced by him to the solicitor while the second will was being prepared; and, on the solicitor pointing out to him that his last will would make no provision for his wife (who was advanced in life), he replied that she would be sufficiently cared for by her daughter.

After the execution of this will, both documents were placed in envelopes and given to the testator, in whose keeping they remained. On the day of his death, testator's wife, sister, and medical attendant being in the room, he asked his wife to bring him the two wills which he had made, and having selected the will of February 3, 1892, he gave it to his wife, and said, "Burn it," which she did by putting it on the fire. When it was destroyed, the testator turned to his wife and said, "There—now you are mistress of everything."

On April 23, 1892, on the assumption that the destruction of the testator's will of 1892, which revoked all previous wills, resulted in an intestacy, letters of administration of the personal estate and effects were granted to the widow, Mrs. Andrews. She died on June 10, 1892, leaving a will and codicil duly executed, of which she appointed Mr. and Mrs. Brown, her son-in-law and daughter, sole executors. The testator left no issue surviving him, and the only persons now entitled in distribution of his estate were his three brothers and four sisters, who had all consented to this application. The value of the estate was 2500*l.*

Searle, on behalf of the executors of Mrs. Andrews, moved that the grant of administration made to her, on the assumption of an intestacy, might be revoked, and that probate might be granted to them of a copy of the will of February 3, 1892. The testator

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IN THE GOODS OF ANDREWS.

directed this will to be destroyed under the impression that he would thereby revive the will of 1872. But, as this was not the effect of the act, there was no revocation. [He cited *Powell* v. *Powell* (1), and *In the Goods of Weston.* (2)]

[GORELL BARNES, J. In those cases, were not the wills propounded? Has an order such as you ask for ever been made on motion?]

If all the parties interested in an intestacy consent, there is no reason why probate should not be granted on motion.

The case stood over in order that the consent of all parties interested might be filed; but on a subsequent day

Searle, informed the Court that there were infants interested in an intestacy who could not consent.

GORELL BARNES, J. In that case, I must refuse to make this order on motion, and must leave you to propound the will.

Solicitors: *Morris & Bristow.*

W. L.

1892
Dec. 5.

[DIVISIONAL COURT.]

COPELAND *v.* SIMISTER AND ANOTHER.

*Probate—Administration—Grant to Representatives of Wife's Next of Kin without the Knowledge of Husband—Fraud—Application to revoke—County Court—Appeal—*20 *&* 21 *Vict. c.* 77, *ss.* 54 *to* 58—21 *&* 22 *Vict. c.* 95, *s.* 11—51 *&* 52 *Vict. c.* 43, *s.* 120.

A husband and wife separated in 1863, and the wife went back to her mother's house, resuming her maiden name. In 1881 she died, and letters of administration to her estate were taken out by the executors of her father's will as if she had been a spinster, although it appeared that one of them knew she was a married woman. In 1888 the husband first became aware of his wife's death, and, after making inquiries, he instituted a suit in the county court for the revocation of the grant. The county court judge directed a nonsuit on the ground that no such fraud had been shewn as to justify him in revoking the letters of administration:—

Held, that the county court judge was wrong in holding that fraud must be shewn to justify him in revoking the grant of administration; that his decision was upon a "point of law" within the meaning of s. 58 of 20 & 21 Vict. c. 77, so that the Probate Division had jurisdiction to entertain an appeal;

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(1) Law Rep. 1 P. & D. 209.

(2) Law Rep. 1 P. & D. 633.

and that the point of law was sufficiently raised at the hearing by the pleadings and the nonsuit to comply with s. 120 of the 51 & 52 Vict. c. 43. The Court, therefore, revoked the letters of administration and made a new grant to the husband.

THIS was an appeal from a judgment of the judge at the county court of Congleton, Cheshire, dismissing an action for revocation of a grant of letters of administration.

The appellant, Gad Copeland, was the husband of Eunice Copeland, deceased, and the respondents, James Simister and Joseph Turnock, were the executors of the will of the father of the deceased, Eunice Copeland.

It appeared from the evidence given at the hearing in the county court, that Gad Copeland, the plaintiff, was married to his wife, then Eunice Turnock, in August, 1858, at the parish church of Wolstanton. They lived together at Harriseahead until 1863, when, in consequence of differences which arose between them, Mrs. Copeland left her husband and went to live with her mother. The husband went to Stockport, where he remained until the year 1888, and they never lived together again. There was no issue of the marriage. In 1881, Mrs. Copeland, who had taken her maiden name, died, and administration to her estate was taken out by the defendants as executors to the will of her father, who had survived her a few months. The administrators in the affidavit which they filed, and also in the administration bond, described the deceased as a spinster, and her maiden name was engraved on her tombstone, although it was alleged that the defendant Turnock, who was her brother, was aware that she was a married woman, as he had been present at the wedding dinner, and had seen the husband on various occasions after the separation.

The plaintiff, Gad Copeland, did not become aware of his wife's death until 1888, when he immediately made inquiries as to her property; but they were frustrated by the fact that the grant had been made in the deceased's maiden name, which he did not discover until about a year before the hearing of the appeal. He then commenced an action for the revocation of the letters of administration, and for the grant of administration to himself as the lawful husband of the deceased.]

The defendants filed notice of special defence, to the effect that the application of the plaintiff was barred by the Trustee Act, 1888, s. 8, and that the claim, if any, of the plaintiff began to run as against the defendants on December 14, 1881. To this the plaintiff objected, first, that the Trustee Act was not a statute of limitation, and, secondly, that if good as a special defence it did not avail the defendants, as in this case there was fraud, and the benefit of s. 8 was specially excepted by the Act where there was fraud. This was the only point of law raised by the defendants.

The county court judge was of opinion that the Trustee Relief Act, 1888, did not apply, and that he had jurisdiction; but at the close of the evidence adduced by the plaintiff he nonsuited the plaintiff with costs, on the ground that the plaintiff had not shewn such fraud as justified him in setting aside letters of administration granted twelve or fourteen years before, having regard also to the fact that the parties had been living separate, and the deceased had been passing for nearly twenty years under her maiden name.

B. Deane, for the appellant. The county court judge was wrong in holding that fraud must be shewn to justify him in revoking the grant of administration. His decision was upon a point of law, and can therefore be reviewed by this Court under s. 58 of the Probate Court Act: *Zealley* v. *Veryard*. (1)

There was sufficient evidence of fraud, for one of the administrators made an affidavit that the deceased died a spinster. But it is unnecessary to raise the question of fraud, inasmuch as the husband was entitled to the administration of his wife's estate even if the previous grant had been issued by a mistake. His rights could not be affected by proceedings to which he was no party, and whether there was fraud or not is immaterial.

Leslie Probyn, for the respondents. This Court has no jurisdiction under the circumstances to entertain this appeal. The section of the Act of 1857 (20 & 21 Vict. c. 77), which gives the county court jurisdiction is s. 54, which was repealed by s. 11 of the 21 & 22 Vict. c. 95, and the second Act contains no provision for an appeal. Consequently, the appeal is by virtue of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, which provides that the county court judge, "at the request of either party, shall make a note of any question of law arising at the trial or hearing." It is a condition precedent of the appeal that a note of the point of law shall be taken at the time: *Smith* v. *Baker* (1); and *Rhodes* v. *Liverpool Commercial Investment Co.* (2), and that condition precedent has not been fulfilled by the appellant. But this is an appeal on a matter of fact, and not of law. The plaintiff asserted that there was fraud, and the learned judge found that, in fact, there was no fraud. Nothing was said then about fraud being immaterial; it was the fact which the plaintiff endeavoured to establish, and which the learned judge decided did not exist. If the Court should be of opinion that the learned judge was wrong the case might be remitted for a new trial, when special circumstances could be shewn why the appellant should be passed over.

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(1) Law Rep. 1 P. & D. 196.

B. Deane, in reply. It could not be known until the county court judge gave his decision that he relied on the absence of fraud. The "question of law" involved in the case was stated in the plaint, viz., whether the plaintiff, as the deceased's husband, was entitled to administration. That was the point which the judge had to decide, and he decided it wrongly. The County Courts Act, 1888, does not relate to this appeal, brought under the Probate Court Acts of 1857 and 1858, which must be read together.

THE PRESIDENT. I think this is a case which may be disposed of at once. It is not necessary for us to decide more than this, that the learned judge in the Court below was wrong in holding that he would not be justified in revoking the grant of administration unless fraud was shewn. That was a mistake in point of law, and, therefore, his decision must be reversed. One or two points have been raised on which it is not necessary to express a final opinion. It is said that as s. 54 of the 20 & 21 Vict. c. 77, is repealed by the 11th section of the 21 & 22 Vict. c. 95, and there is no section referring to appeals in the Act of 1858, the jurisdiction of appeal disappeared until the passing of the

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(1) [1891] A. C. 325.

(2) 4 C. P. D. 425.

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COPELAND v. SIMISTER.

The President.

County Courts Act of 1888 (51 & 52 Vict. c. 43), s. 120. I should be slow to believe that that can be the true construction of the Act. It seems to me more reasonable to suggest that the two Acts of 1857 and 1858 must be read together—at any rate, as regards this particular section. The only reason for making that point was to shew that the appeal was under the Act of 1888, and that, therefore, the point of law ought to have been raised at the trial. However that may be, whether the appeal was under one Act or the other, I am clear that the point was taken because the claim set up was that the plaintiff had a right to the grant of administration as he was the husband of the deceased. Further than that, the judge nonsuited the plaintiff on the ground that there had been no fraud. Therefore, I think the point of law was sufficiently taken to satisfy the Act, and it appears to me clear that this Court has jurisdiction to entertain the appeal. Then the question arises, what should be done. If there appeared to be any possibility that the defendants could substantiate their case, I should have thought it right to send it back to the Court below. But neither in the defence pleaded, nor in the cross-examination, nor by counsel here, has any possible ground of defence been suggested. It would, therefore, be waste of time and money to send the case back; and in my opinion the judgment of the Court below ought to be reversed, the letters of administration ought to be revoked, and a grant made to the husband. As to the costs, the only ground for depriving the plaintiff of them is, that he did not bring his action for four years after he knew of his wife's death. If I could see that the defendants were prejudiced by that delay, I might have come to a different conclusion; but, inasmuch, as the death was so long ago as 1881, it seems impossible that the administration should not have been completed long before the husband came to know of his wife's death. There is no ground, therefore, for saying that the costs should not follow the event.

GORELL BARNES, J., concurred.

Appeal allowed.

Solicitors for the appellant: *Burton & Stanley.*

Solicitors for the respondent: *Prior, Church, & Adams.*

W. L.

In the Goods of JAMES WRIGHT.

1892
Dec. 5, 13.

Probate—Administration—Lost Will—Grant of Administration until Will Found.

Upon an application for a grant of administration until a lost will should be found, it appeared that the testator had duly executed a will, but that it could not be found after his death, and, his widow who refused to attend and be examined having stated that it had been accidentally destroyed, there was no evidence as to its contents:—

Held, that a grant of administration of the estate and effects of the deceased might be made to his only son with the consent of the other next of kin, limited to dealing with certain specified property, until such time as the will might be forthcoming.

Application for a grant of administration until a lost will should be found.

It appeared that James Wright, late of 29, Nile Terrace, Bermondsey, Surrey, died on May 1, 1887, leaving a widow, his next of kin, and the only persons entitled in distribution surviving him. He was supposed to have made a will in 1886 or 1887; but it could not be found after his death, and no information was forthcoming as to the nature of its contents or the property of which it disposed. The value of the deceased's estate was between 300*l.* and 400*l.*, and it comprised several leasehold houses which it was desired to sell, but which could not be sold until a personal representative of the deceased was appointed.

Mr. J. T. Riches, of 48, Jamaica Road, Bermondsey, secretary to the East Surrey Building Society, made an affidavit that, some time in the year 1886 or 1887, he drew a will for the deceased, which was duly executed; but he could not recollect what its provisions were; and John Lawson, of Bermondsey, rate collector, also made an affidavit that he had attested a will for the deceased, which he believed had been drawn by Mr. Riches, who was present at the execution.

From an affidavit made by Mr. J. T. Wright, the son of the deceased, it appeared that the widow, Mrs. Wright, had told him that he had executed a will which had been drawn for him by Mr. Riches, but that it had been accidentally destroyed; and on August 12, 1892, an order was served personally on the widow,

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Mrs. Wright, under s. 26 of 20 & 21 Vict. c. 77, directing her to attend and be examined as to her knowledge of the deceased's will. She had not obeyed the order, and was supposed to have left the country.

L. D. Powles, moved, on behalf of Mr. J. T. Wright, the son of deceased, for a grant of administration of the estate and effects of the deceased until the will be found, and cited *In the Goods of Metcalfe.* (1)

Gorell Barnes, J. That seems to have been only a grant ad colligenda to protect the estate until the will was forthcoming, and a grant ad colligenda would not go far enough for you, as there does not seem much chance of the will turning up. *In the Goods of Campbell* (2) is more in your favour; but if you take a full grant you will have to treat the widow as entitled to her third. I cannot, however, make a grant without the consent of all the next of kin.

On a subsequent day, *Powles,* renewed the motion on an affidavit by Anna Wright, the sister and sole remaining next of kin, consenting to it; and

Gorell Barnes, J., made a grant of administration to Mr. J. T. Wright, until the original will or an authentic copy be brought into the Registry, limited to dealing with and completing the sale of the leasehold houses, and giving a discharge for the purchase-money thereof. The renunciation or citation of the widow was dispensed with.

Solicitors: *Maynard & Son.*

(1) 1 Add. 343.

(2) 2 Hagg. Ecc. 555.

W. L.

THE MONTE ROSA.

1892
Nov. 23, 24, 25.

Admiralty—Collision—Thames Rules, r. 20—Anchor not stock awash by Order of Compulsory Pilot—Contributory Negligence.

In daylight, in the river Thames, a tug negligently came into collision with a steamer, and sustained damage from the anchor which, in breach of rule 20 of the Thames Rules, the steamer was carrying, by order of a compulsory pilot, at the hawse-pipe instead of stock awash. Those in charge of the tug were aware of the position of the anchor; but, after the negligent act of the tug had produced risk of collision, there was no time for those in charge of the steamer, by lowering the anchor or otherwise, to avert the damage.

In an action of damage by collision, brought by the owners of the tug against the steamer:—

Held, that the owners of the steamer were not responsible, for though the Thames rule was infringed, the position of the anchor was a matter within the province of the pilot in navigating the vessel, and, secondly, though the steamer was guilty of negligence in breaking the rule, still the tug, by ordinary care, exerted up to the moment of the collision, might have avoided it, and the consequent damage.

Action of damage by collision.

The plaintiffs were the Elliott Steam Tug Company, owners of the tug *Contest*. The defendants were the owners of the steamship *Monte Rosa*.

The facts—so far as material, on the question whether the defendants, the owners of the *Monte Rosa*, were responsible for the damage to the plaintiffs' tug, through a breach, by the pilot's order, of the Thames rule as to the position of the anchor—were shortly as follows:—

On June 1, 1892, the plaintiffs' screw steam-tug *Contest*, of 10 tons register, engines of 50 horse-power nominal, and a crew of seven hands, was engaged, at Gravesend, in the river Thames, to assist in docking the defendants' steamship *Monte Rosa*, of 1588 tons register, engines of 250 horse-power nominal, a crew of 29 hands, and a general cargo, from Philadelphia to the South West India Dock, London, in charge of a duly licensed pilot by compulsion of law.

The tug proceeded up the river ahead of the *Monte Rosa*, and, about 6 P.M., was in Bugsby's Reach, making about seven knots an hour, the weather being fine and clear, the wind fresh from the S.W., the tide about high water. The *Monte Rosa*—according to the view of the evidence adopted by the Court—was heading straight up the Reach, and had the tug, about thirty feet from, and two to three points on, her starboard bow, when the master of the tug, thinking it was about time to get a rope on board, threw a line, which missed, then starboarded, and again threw a line; but this time the tug was so negligently handled, that she sheered across the bows of, and came into collision with, the *Monte Rosa*, breaking the stock of the starboard anchor of that vessel, and being herself holed in two plates, below the water-line, on the port quarter, and, in the result, her propeller being also knocked off, the tug drove ashore full of water.

The cause of the damage was disputed, the plaintiffs contending that it was done by the starboard anchor of the *Monte Rosa*, the defendants contending that it was done by her stem and starboard bow; but after the actual plates of the tug, and a model, alleged to be to scale, of the fluke of the Trotman anchor, which was projecting some six feet from the side of the *Monte Rosa*, had been inspected by the two Elder Brethren of the Trinity House who were assisting the learned judge, the Court, on their advice, came to the conclusion that the damage was done by the anchor of the *Monte Rosa*, which, in breach of rule 20 of the Thames Rules (1), was being carried with the shackle at the hawse-pipe, so that the stock was considerably out of, and the flukes were about level with, the water.

Those in charge of the tug were aware of the position of the anchor. It had been put to the hawse-pipe by order of the sea pilot, and remained there by order of the river pilot, who, according to the master of the *Monte Rosa*, on coming on board at Gravesend, said, in substance, to him: "I see your anchor is at the hawse—leave it so," and half-an-hour afterwards said,

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(1) Rules and Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Order in Council, February 5, 1872:—

Rule 20: "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way."

"Tell the mate when we ease down to go into dock the stock is to be put awash." These directions the master conveyed to the mate on the forecastle by the boatswain, and, according to the mate, he subsequently went aft to the pilot on the bridge, who said, in substance, to him, "Don't lower the anchor till we ease for the dock, and then lower it stock awash."

The *Monte Rosa*, at the time of the collision, had not eased for the dock, and it was given in evidence by the defendants that from its position at the hawse-pipe, the anchor could be promptly lowered to stock awash, but the vessel would not steer as well if the anchor were so carried. It was also proved that on seeing danger from the tug sheering across the bows, the engines of the *Monte Rosa* were stopped; and it was alleged that, as only a few seconds elapsed before the collision, there was no time, by lowering the anchor or otherwise, to avert the damage.

Pyke, Q.C., and *A. E. Nelson*, for the plaintiffs, the owners of the tug *Contest*. (1) The anchor of the *Monte Rosa* was being carried in a position contrary to rule 20 of the Thames Bye-laws, and as that steamer was not within any of the exceptions mentioned in the rule, her owners are responsible for the consequences of the infringement.

[GORELL BARNES, J. That rule has not the same sanction as the Regulations for Preventing Collisions at Sea. As those in charge of the tug could see the anchor, must they not avoid it? Though they could see the anchor was in a wrong position still they chose to run against it! Does not that bring the case within the principle of contributory negligence at common law? —*Davies* v. *Mann*. (2)]

No; the owners of the tug will not be prevented from recovering, for the *Monte Rosa* might, by ordinary care, have avoided the damage. Assuming that the tug was negligently navigated, still the *Monte Rosa* was guilty of contributory negligence, for which she is liable, because the evidence shews that there was an appreciable interval of time between the tug taking the

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(1) Owing to the view the Court took of the facts, the arguments of the plaintiffs' counsel, as to the collision having been caused by the negligent navigation and excessive speed of the *Monte Rosa*, are omitted.

(2) 10 M. & W. 546.

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sheer and the actual blow, and, during that time, those in charge of the *Monte Rosa* might have averted the damage by promptly reversing the engines and lowering the anchor.

Again, the position of the anchor is essentially a matter within the control of the master, as part of the equipment of the vessel, and even if the pilot did order the anchor to be kept in the dangerous position in which it was, still this will not exonerate the owners of the *Monte Rosa*, as the master is bound to see that the rule is not infringed, just as in the analogous case of lights: *The Ripon.* (1)

Sir Walter Phillimore, and *Aspinall, Q.C.*, for the defendants, the owners of the *Monte Rosa.* (2) Assuming that the damage was done by the anchor of the *Monte Rosa*, her owners are exempt from liability on the ground of compulsory pilotage, for the position of the anchor is a matter strictly within the province of the pilot in navigating the vessel: *The Rigborgs Minde* (3), citing *The Gipsey King.* (4) Where it is a question of navigation, the master would not be justified in interfering with the pilot, even though the pilot is infringing a rule: *The Argo* (5).

Secondly, assuming that the conduct of those in charge of the *Monte Rosa* in respect of the anchor was negligent, still the position of the anchor was obvious, and the danger was one which those in charge of the tug ought not to have incurred, and the consequences of which they might have avoided: see the cases collected under this head in Addison on Torts, 6th ed. pp. 23, 24; see also the second case put in the judgment of Lindley, L.J., in *The Bernina* (6). The case of *The Margaret* (7) does not conflict with this view, as there the collision occurred at night, so that the dangerous position of the anchor was not visible to those in charge of the barge.

Finally, it is submitted, on the evidence, that the sheer of the tug took place so suddenly that there was no time for the *Monte Rosa* to take the necessary steps to avert the damage.

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(1) 10 P. D. 65.

(2) Owing to the view the Court took of the facts, the arguments of the defendants' counsel, as to the damage having been caused by the stem and starboard bow of the *Monte Rosa*, are omitted.

(3) 8 P. D. 132.

(4) 2 W. Rob. 537.

(5) Swa. 462.

(6) 12 P. D. 58, at p. 89.

(7) 6 P. D. 76.

Pyke, Q.C., in reply. First, as to the defence of compulsory pilotage. Assuming, without admitting, that the position of the anchor may be a matter within the province of the pilot, still if he is obliged to keep the anchor at the hawse-pipe, instead of stock awash, in order that the vessel may steer, the owners of the *Monte Rosa* are responsible because they are bound to provide a vessel so trimmed and equipped that she can be navigated without infringing the rules.

Secondly, the common law principle of contributory negligence does not apply, for this case is not distinguishable from *The Margaret* (1), and the fact that the collision in that case occurred at night makes no difference, for, as in that case, there would have been no damage but for the anchor, so here, if the tug is to be held to blame for negligent navigation, then the defendants' steamer is also to blame because, but for her anchor, no damage would have occurred. The contributory negligence of the steamer was the immediate cause of the damage, and, both vessels being therefore to blame, the Admiralty rule as to half damages applies.

[GORELL BARNES, J. In order to bring in the Admiralty rule as to half damages, must it not be shewn that the steamer could, at the time the tug took the sheer, by the exercise of reasonable care and skill have got the anchor out of the way?]

The evidence shews that there was time for the steamer to have reversed her engines and lowered the anchor. It is also submitted that, as the steamer was breaking a rule, it was incumbent on those in charge of her to be extra-vigilant in avoiding damage to other vessels, and it cannot be that the steamer was at liberty, in breach of a rule, to carry her anchor all the way up the river in an improper position, and then, when an accident occurs, aver that it was the duty of other vessels to keep out of the way of the anchor, the dangerous position of which was the sole cause of the damage.

GORELL BARNES, J. [After detailing the facts already set out, and stating that the cause of the collision was the improper manœuvring of the tug bringing her across the bows of the steamer; that the steamer stopped on seeing the danger, but had no time to do anything more, and that the damage to the tug was, in the opinion of the Trinity Masters, due to the anchor of the steamer, the learned judge proceeded :—] Now, as I adopt the opinion of the Trinity Masters, and find that the anchor of the *Monte Rosa* did the material damage to the tug, questions of some nicety arise, for there can be no doubt that the anchor was carried up the Thames in a position not in accordance with rule 20 of the Thames Bye-laws, which requires the stock to be awash.

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(1) 6 P. D. 76.

The first question to be determined is one of fact, viz., whether the anchor was in that position in accordance with the pilot's orders. On that there is the evidence of the master and mate of the *Monte Rosa.* [The learned judge read the evidence already set out, and continued :—] I have no hesitation in accepting the statement of those two officers, that the anchor of the *Monte Rosa* was in its position by the pilot's orders at the time of the accident.

Then comes the question of law raised by the defendants, viz., that the position of the anchor is a matter within the province of the pilot, even though there is a rule to the effect that it ought not to be in the position to which it was ordered by him. It is argued on behalf of the defendants that it is part of the duty of the pilot, who is in charge of the navigation of the vessel, to give orders as to the position of the anchor. It is said on the other side that that is not the true view with regard to the anchor, and the case of *The Ripon* (1) was relied on. In that case a vessel in the Humber, by the pilot's orders, exhibited, in addition to the regulation masthead and side-lights, a white light, from the main peak, shewing astern. It was held that the vessel was to blame for a breach of a statutory regulation, which it was impossible to say might not have contributed to the collision, and that there was no circumstance to make a departure from the regulations necessary. It was further held that the exhibition of the light by order of the pilot did not exempt the owners of the vessel from liability, as the master should not have permitted an infringement of the regulation.

The plaintiffs contend that the case of an anchor is strictly

(1) 10 P. D. 65.

analogous to the case of a light; but, in my opinion, that is not so.

In *The Gipsey King* (1) a vessel had come into collision with another, and the anchor, which had not been hoisted on deck, nor catted as proper and customary, but which was hanging over her bow under water, made a hole in the other vessel.

Dr. Lushington said (2): "If the pilot, then, is to decide the mode of anchoring a vessel, it appears to me to follow as a necessary consequence, that the pilot is responsible to see that the anchor is in a proper situation to be dropped when necessary."

In *The Rigborgs Minde* (3) damage had been done by the fluke of a schooner's anchor piercing the side of a fly-boat. The Court found that there was no want of care on the part of the crew, and it was held that the damage was caused by the fault of the pilot in the course of his duty.

It is however urged on behalf of the plaintiffs, that even if it is part of the pilot's duty to attend to the position of the anchor, and give orders with reference to it, still the master is to blame, and his owners through him, because the master is bound to comply with the rules, and interfere with the pilot if he gives orders in connection with the anchor which infringe the rules.

I think that such a proposition cannot be laid down as sound in face of a decision like that of *The Argo* (4) where a steamer was being navigated, under the pilot's orders, on the wrong side of the channel, contrary to the (now repealed) 297th section of the Merchant Shipping Act, 1854, and it was held that the master was not bound to interfere, and that the owners were not responsible for the damage caused thereby.

In my opinion the pilot is responsible for the position of the anchor as part of his duties in the ordering of the navigation of the ship and her manœuvres, and the case of an anchor is not analogous to that of a light, with which the pilot really has nothing to do, it being entirely the master's duty to see to the

(1) 2 W. Rob. 537.
(2) At p. 547.
(3) 8 P. D. 132.
(4) Swa. 462.

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lights, so as to make the ship in a proper state to navigate according to the rules.

I therefore think on this point, on which there is not very much authority, that although the rule was infringed, still as the anchor was in the position in which it was by the pilot's orders, the pilot was in fault, and the owners of the *Monte Rosa* are exempt from responsibility.

There is, however, a further point which, if established, is, I think, equally fatal to the plaintiffs' case. The rules of the Thames have not the same sanction as the sea rules, in this respect, that, in the case of the Thames Rules it must be shewn that the breach of the rule contributed to the collision, whereas the statutory provisions, as to the sea rules, in substance provide, that it is sufficient to shew a breach of the regulations, and then, unless the ship breaking the regulation can establish that by no possibility could that breach have anything to do with the matter, she is held to blame.

The effect of that difference is that, in the present case, which turns on the Thames rule, it must be established that the breach of the rule contributed to the collision. This brings in principles which have been very tersely expressed in Mr. Marsden's book (1), and which are recapitulated and adopted in Mr. Beven's book. (2)

It seems to me that, if the case falls within the second rule, as laid down in Mr. Marsden's book, namely, that the plaintiff can recover nothing, though the defendant was guilty of negligence contributing to the collision, if the plaintiff, by ordinary care, exerted up to the moment of the collision, could have avoided it, then the plaintiffs must fail in this case.

That rule is adopted, I think, and certainly is in accordance with the decision in *Cayzer Irvine & Co.* v. *The Carron Co.* (3), where Lord Watson in giving judgment, and dealing with the breach of a Thames rule by a steamer called the *Clan Sinclair*, said (4): "The new and wrong position into which I assume the *Clan Sinclair* had been brought by her neglect of the rule, was perfectly apparent to those on board the *Margaret*, apparent for a considerable time and a considerable distance—for a time and distance of such appreciable extent that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule, and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*."

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(1) The Law of Collisions at Sea, 3rd ed. p. 23.

(2) Principles of the Law of Negligence, p. 943.

(3) 9 App. Cas. 873.

(4) At p. 887.

If that is the rule, it still does not exhaust the question, because it may be that, though there was negligence on the part of the tug, yet there was negligence on the part of the steamer in that she might have avoided the consequences of the collision at the last moment by further action in connection with the anchor.

I do not forget, in dealing with this part of the case, the decision in *The Margaret* (1), where a distinction was, it appears to me, rightly drawn, if I may, with all respect, say so, between the collision and the damage ensuing, and in my observations I am treating the question of the damage being, or not being contributed to, as forming part of the matter which I have to consider.

In the present case the anchor was visible to those on board the tug, and, being so visible, was a source of danger which was apparent to them, and yet they were guilty of negligence in not avoiding coming in contact with it.

I am of opinion that not merely the collision, but the damage ensuing from it, were matters which—although the steamer may have been guilty of negligence, and was in fact guilty of negligence in breaking the rule—could have been avoided by the exercise of reasonable care, on the part of the tug, exerted up to the moment of collision.

Then could the steamer have done anything to avoid the damage at the last moment, or within a reasonable time before it? The argument on behalf of the plaintiffs is that she could. That question I have asked the Elder Brethren, as it is a matter of nautical skill, and their view is that the time which elapsed—from the moment when the sheer of the tug towards the bows of the steamer produced any reasonable risk of collision, to the time of the blow—was far too short for those on board the steamer to do anything more than they did. Their opinion is that it was almost momentary, and that anybody present and able to act, if ordered to do so, could not have acted sufficiently rapidly to have avoided this collision, and—which is the real point, having regard to the decision in *The Margaret* (1)—the damage caused by it.

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(1) 6 P. D. 76.

I am of opinion that the collision and the damage which flowed from it were due to the negligent action of the tug; that the position of the anchor of the *Monte Rosa* was a matter for the pilot, and that, as regards the damage done by it, the anchor was an obvious danger which could have been avoided by the exercise of reasonable care on the part of the tug; that, at the time when the tug sheered towards the steamer, no want of care was exhibited on the part of the steamer which could in any way have affected the matter, and that the tug is alone to blame. Therefore, the claim must be dismissed with costs.

Solicitors for the plaintiffs, the owners of the tug *Contest*: *Lowless & Co.*

Solicitors for the defendants, the owners of the *Monte Rosa*: *Thomas Cooper & Co.*

T. L. M.

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(1) 6 P. D. 76.

[IN THE COURT OF APPEAL.]

C. A.
1892
Dec. 12.

THE DART.

Admiralty—Practice—County Court—Appeal from Divisional Court to Court of Appeal—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 45—*County Courts Act*, 1875 (38 *&* 39 *Vict. c.* 50), *s.* 10—*Rules of Supreme Court, Order* LIX., *r.* 4—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 188, *sub-s.* 5.

By s. 45 of the Judicature Act, 1873, appeals from county courts to a Divisional Court are to be final unless special leave to appeal to the Court of Appeal is given by the Divisional Court.

By s. 10 of the County Courts Act, 1875, no leave to appeal to Her Majesty in Council shall be necessary where the High Court of Admiralty "alters" the judgment of the County Court.

By Rules of Supreme Court, 1883, Order LIX., r. 4, Admiralty appeals from inferior courts shall be heard and determined by a Divisional Court of the Probate, Divorce, and Admiralty Division.

By s. 188 of the County Courts Act, 1888, the whole of the County Courts Act, 1875, is repealed; but by sub-s. 5 "this repeal shall not revive any enactment . . . not in force . . . at the commencement of the Act."

A county court in an Admiralty action gave judgment for the defendants.

A Divisional Court of the Probate, Divorce, and Admiralty Division, sitting in Admiralty, reversed the judgment, and refused leave to appeal.

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), that as the judgment of the county court had been "altered" by the Divisional Court, the appeal could be heard without leave, for so much of s. 45 of the Judicature Act, 1873, as was inconsistent with s. 10 of the County Courts Act, 1875, was impliedly repealed by the latter Act, and therefore was "not in force" at the time of the repeal of the County Courts Act, 1875, by the County Courts Act, 1888.

APPEAL by the defendants from a decree of a Divisional Court of the Probate, Divorce, and Admiralty Division, sitting in Admiralty, reversing the judgment of a county court in an Admiralty action.

The case is reported only on the question of the right of appeal to the Court of Appeal.

On March 27, 1891, a collision occurred, near Rochester Bridge on the Medway, between the plaintiffs' barge *Isabella Little* and the defendants' barge *Dart*.

On June 23, in an action for damage brought by the plaintiffs in the county court of Kent holden at Rochester, the learned county court judge (who was assisted by a naval officer as assessor), by his decree, without calling on the defendants, directed judgment to be entered for the defendants with costs, on the ground that the plaintiffs had failed to prove any negligence in the navigation of the defendants' barge.

The plaintiffs appealed to the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, and on January 13, 1892, the Divisional Court (Sir Charles Butt, President, and Jeune, J., assisted by two of the Elder Brethren of the Trinity House) set aside the decree, and remitted the action to the Court below for retrial, with directions that the Court should be assisted by a nautical assessor, or assessors, other than the assessor who had previously acted.

On February 10, 1892, the case again came before the judge of the county court of Rochester, assisted by two naval officers as assessors, and on February 23 the learned judge made a decree by which judgment was again entered for the defendants on the ground that there was no negligence on the part of the defendants' barge.

From this second decree the plaintiffs again appealed to the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court, and on August 9 the Divisional Court (Sir Francis H. Jeune, President, and Gainsford Bruce, J., assisted by two of the Elder Brethren of the Trinity House) reversed the decree, and pronounced in favour of the plaintiffs' claim for damages, condemned the defendants therein and in the costs in the Court below on the trial and retrial, and in the costs of the two appeals, and referred the damages to the registrar of the county court to report the amount thereof, and refused the defendants leave to appeal.

From this decree of the Divisional Court the defendants appealed to the Court of Appeal.

Pyke, Q.C. (*Baden Powell*, with him), for the respondents (plaintiffs), took the preliminary objection that there was no jurisdiction to hear the appeal. Under s. 29 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), no appeal could be heard from a decree of the High Court of

Admiralty, made on appeal from a county court, except by the express permission of the judge of the Admiralty Court. This section was repealed by s. 12 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), and by s. 10 of that Act where the judgment of the county court was affirmed by the High Court of Admiralty, express permission was required. It is true that that section further provided that no leave to appeal to Her Majesty in Council was necessary where the judgment of the county court was "altered"; but the right of appeal under that portion of the section is gone, because the whole of the County Courts Act, 1875, was repealed by s. 188 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

The right of appeal is therefore no longer regulated by special legislation, but depends on the Rules of the Supreme Court, 1883, Order LIX., r. 4, by which Admiralty appeals from inferior courts are to be heard and determined by a Divisional Court of the Probate, Divorce, and Admiralty Division, and by s. 45 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), "the determination of such appeals by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court."

As leave has been refused, this appeal cannot be heard.

Bucknill, Q.C. (*A. E. Nelson*, with him), for the appellants (defendants). By s. 19 of the Judicature Act, 1873, a general right of appeal from judgments of the High Court is given to the Court of Appeal, subject to rules. By s. 45 of the same Act, the determination of appeals from county courts by Divisional Courts of the High Court shall be final, unless special leave to appeal is given by the Divisional Court. This Act came into operation on November 1, 1875, but the following day it was followed by the County Courts Act, 1875, and by s. 10 of the latter Act no leave to appeal to Her Majesty in Council is necessary where the High Court of Admiralty "alters" the judgment of the county court. The effect of this section of the County Courts Act, 1875, is to impliedly repeal so much of s. 45 of the Judicature Act, 1873, as is inconsistent with it: *The Lydia* (1); and, though the whole of the County Courts Act,

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(1) 14 P. D. 1.

1875, was repealed by the County Courts Act, 1888, it is expressly provided, by sub-s. 5 of s. 188 of that Act, that the repeal shall not revive any enactment "not in force" at that time.

As appeals to the Probate, Divorce, and Admiralty Division are now substituted for appeals to the High Court of Admiralty, and as appeals to the Court of Appeal are now substituted for appeals to Her Majesty in Council, it follows that, as the Divisional Court in this case reversed, that is "altered," the judgment of the county court, a right of appeal to the Court of Appeal exists without leave, and therefore the Court has jurisdiction to hear this appeal.

LORD ESHER, M.R. I think we are bound to hear this appeal.

LOPES, L.J. I am of opinion that as s. 10 of the County Courts Act, 1875, is different in its terms from s. 45 of the Judicature Act, 1873, they cannot be read together—that is to say, they cannot be read together to this extent, that the provision of the Act of 1875 applies to a case where the judgment of the county court has been "altered." Then sub-s. 5 of s. 188 of the County Courts Act, 1888, provides that "this repeal shall not revive any enactment not in force at the commencement of this Act." I think, therefore, that meets this case, and that there is an appeal.

KAY, L.J. I agree; but I must say that I never before saw such a curious complication of legislation. The Judicature Act, 1873 (which came into operation on November 1, 1875), enacted, in effect, that from a decision of a Divisional Court on appeal from a county court, there should be no further appeal without the leave of the Divisional Court. An Act which came into operation the next day, the County Courts Act, 1875, enacted, in effect, that there should be an appeal without leave from the Divisional Court, if the Divisional Court "altered" the judgment of the county court in an Admiralty cause. As Lopes, L.J., has said, those two sections are to that extent absolutely inconsistent, and to that extent this statute, passed the day after the Judicature Act, 1873, came into operation, must be treated as having altered, that is repealed, s. 45 of the Judicature Act,

1873. Then the County Courts Act, 1888, repealed that section of the County Courts Act, 1875, which had altered the Judicature Act, 1873; but sub-s. 5 of the repealing section says: This repeal shall not revive any enactment not in force at the commencement of this Act. That part of s. 45 of the Judicature Act, 1873, which prevented an appeal without leave, where the Divisional Court had altered the order of the county court, was not in force when the Act of 1888 was passed; and therefore, by the very terms of s. 188, although the Act of 1875 is repealed, this enactment of the Judicature Act was not revived.

Accordingly, it seems to me, there is an appeal without leave from an order of the Divisional Court altering a judgment of the county court in an Admiralty action.

Objection to jurisdiction overruled.

The appeal was then heard on the merits, and dismissed with costs.

Solicitors for appellants (defendants): *Lowless & Co.*

Solicitors for respondents (plaintiffs): *Ingledew, Ince & Colt*, agents for *Basset & Boucher, Rochester.*

T. L. M.

1892
Dec. 6.

[DIVISIONAL COURT.]

THE FERRO.

Admiralty—Bill of Lading—Excepted Perils—" Act, neglect, or default of the pilot, master, or mariners in the . . . management of the ship"—Negligent Stowage of Stevedore—Shipowner's Liability.

The plaintiff shipped a quantity of oranges on board the defendants' vessel, under a bill of lading, excepting (inter alia) "damage from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship."

The oranges were damaged by the negligent stowage of the stevedore:—

Held, that the defendants were not protected by the exception in the bill of lading, as the stevedore was not included in the list of persons whose acts, &c., were excepted, and the words "management of the ship" did not include improper stowage.

Appeal by defendants, the owners of the steamship *Ferro*, against a judgment of the judge of the county court of Glamorganshire, holden at Cardiff, for 121*l*. 5*s*. 6*d*. damages for the depreciation in value of the plaintiff's goods through improper stowage.

The facts—so far as material—were briefly as follows:—

On February 20, 1892, 833 cases of oranges were shipped, at Valencia, on the defendants' steamship *Ferro* for Liverpool, under a bill of lading, signed by the master, and indorsed to the plaintiff, and which excepted (inter alia) " damage or loss . . . from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship."

The plaintiff had no notice, and there was no reference in the bill of lading to the fact, that the vessel, at the time, was under charter; but, by consent, the charterparty, dated November 23, 1891, was put in and read at the trial. It contained the following clause: " The cargo to be . . . properly stowed by a regular stevedore appointed by charterers or their agents at the risk and expense of the steamer, he being wholly under the direction of the master. . ."

After the oranges in question had been loaded at Valencia, by a stevedore appointed by the charterers' agent, the vessel went to Almeria, and there took in a large number of boxes of oranges, which were salved goods, in a rotten, broken, and dirty condition, and which were placed by the stevedore, appointed by the charterers' agent, immediately over and resting upon the plaintiff's goods.

On arrival at the port of discharge, it was found that a number of boxes of the plaintiff's oranges were damaged by the rotten state of the oranges taken in at Almeria, and that a number of other boxes were broken and their contents damaged, owing to their having been stowed in such a way that their ends rested on the angle-irons and waterways, and so were kept up, whilst the other ends were subjected to pressure by the rest of the cargo settling down.

At the trial in the county court of Cardiff, the learned judge found "as facts that the plaintiff's goods were, in these particulars, improperly and negligently stowed, and that the stowage at Valencia and Almeria was negligently done by the stevedore employed there"; and the learned judge, in the course of his judgment, said, "The only question of law raised by the defendants was, that they are relieved from liability by the words "any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship." The defendants contend that all the acts which caused the damage were done in the stowage of the cargo, and that the stowage was part of the management of the ship. No authority was cited as to the meaning of the words "management of the ship"; but in *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association* (1) it was decided that bad stowage was not covered by the words "improper navigation," and Charles, J., in giving judgment, said (2): "The damage 'was caused by the act of the plaintiffs (the shipowners) in putting the goods into a ship which had not been effectually cleaned. She was when loaded unfit to receive a cargo of wheat, and, as might have been anticipated, the wheat was spoiled. That this was improper management can scarcely be disputed.' By an opinion so expressed I am, I think, bound; but . . . I think it very doubtful if in the present case 'management' does include stowage." The learned judge then referred to the cases of *Hayn* v. *Culliford* (1); *Sandeman* v. *Scurr* (2); *Blakie* v. *Stembridge* (3); *The Catherine Chalmers* (4); Scrutton on Charterparties, 2nd ed. p. 106, note (*h*), and held that this case was governed by the two first-mentioned cases, and decided in favour of the plaintiff, on the ground that "the stevedores employed at Valencia and Almeria were so employed by the defendants, and were their servants; that the defendants were liable for the damage done to the plaintiff's goods by the negligence and bad stowage of the stevedores"; and that the "defendants were not relieved under the bill of lading from the liability which they had so incurred."

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(1) 22 Q. B. D. 727; affirmed on appeal 23 Q. B. D. 342.

(2) 22 Q. B. D. at p. 729.

On appeal,

Pyke, Q.C., and *Bailhache*, for the appellants (defendants). The exception in the bill of lading was inserted to protect the shipowner against the cargo owner, and some separate meaning must be given to the word "management" as apart from the word "navigation" of the ship, otherwise the object of the exception will be defeated, and the shipowner will not be duly protected. It is submitted that some such words as "in so far as it affects the stowage of the cargo" are necessarily implied. Assuming, therefore, that the negligent stowage was owing to the negligence of the defendants or their servants, the defendants are exempt from liability under the terms of the contract with the plaintiff, as the exception protects the defendants from the act, neglect, or default of the master in the management of the ship, and it was the neglect or default of the master that led to the damage, for he actively interfered with the stevedore, and told him where to stow, but did not properly superintend the stowage and direct the stevedore, as he was bound to do under the terms of the charterparty.

Again, it is part of the "management of the ship" to lay down planks, and make the hold level for the reception of the cargo, which, in this case, was oranges, just as it is necessary to cleanse the hold before a cargo of wheat is taken in, and it was clearly the opinion of Charles, J., in *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association* (1), that the omission to do this was bad "management."

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(1) 4 C. P. D. 182.

(2) Law Rep. 2 Q. B. 86.

(3) 28 L. J. (C.P.) 329; 29 L. J. (C.P.) 212; 6 C. B. (N.S.) 894.

(4) 2 Asp. M. L. C. 598.

It was the want of proper dunnage which caused the breakage of the boxes of oranges when the cargo settled down, which was bad management of the ship, just as it would be if, whilst at sea, it became necessary to ventilate the ship, and for that purpose to uncover the hatches, and this was done carelessly so that water got down to the cargo.

In *Blakie* v. *Stembridge* (2), the master would have been liable for the acts of the stevedore appointed by the charterers if those acts had been done in pursuance and in the execution of the master's orders; but he escaped liability because the goods were damaged through the negligence of the stevedore whilst being hoisted on board and before they got into the possession of the master against whom the action was brought, and, as pointed out by Dr. Lushington in *The Helene* (3), the master had taken no part in the stowage.

In *Sandeman* v. *Scurr* (4), Cockburn, L.C.J., in his judgment (5), said that "the plaintiffs (the shippers of the goods) were no parties to the employment of the stevedore, and have a right to look to the owners for the proper stowage and safe conveyance of the goods." It would follow from this that the plaintiff in this case can look to the defendants, and, but for the exception in the bill of lading, recover from them for negligence in the management of the ship by the master in the matter of stowage, for, as the holder of the bill of lading knew nothing of the charter, he was entitled to regard the negligence of the stevedore as the negligence of the master.

If, however, the Court should regard the stowage of the boxes of oranges on the angle-irons at Valencia as coming within the words "management of the ship" as distinguished from the stowage at Almeria of rotten oranges on the top of the plaintiff's goods, then it may become necessary for the Court to apportion the damage and limit the liability of the defendants accordingly.

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(1) 22 Q. B. D. 727; 23 Q. B. D. 342.

(2) 28 L. J. (C.P.) 329; 29 L. J. (C.P.) 212; 6 C. B. (N.S.) 894.

(3) Br. & L. 415, at p. 424; Law Rep. 1 P. C. 231, at p. 335.

(4) Law Rep. 2 Q. B. 86.

(5) Law Rep. 2 Q. B. p. 98.

Abel Thomas, Q.C., and *Carver*, for the respondent (plaintiff). The negligence complained of is negligent stowage, and this has nothing to do with the exception as to "management of the ship" by the master. The evidence shews that, in fact, the master was not present throughout the stowage of the cargo, and did not interfere with the stevedore. [They were stopped by the Court.]

THE PRESIDENT (SIR FRANCIS JEUNE.) There are two points raised in this case; and, though a decision on either would be sufficient to decide it, I propose to say a few words about both.

The first of these is, whether the injury that was done to the cargo was done by the negligence of the stevedore, or by the negligence of the master in stowing it. If the negligence was the negligence of the stevedore, then it was not the negligence of any person whose negligence was one of the exceptions in the bill of lading.

In the first place the charterparty has been referred to to shew what the relation of the stevedore to the master was. The charterparty provides that the cargo is to be "brought to and taken from alongside at merchants' risk and expense, and to be properly stowed by a regular stevedore appointed by the charterers or their agents, at the risk and expense of the steamer, he being wholly under the direction of the master."

Now, it is said that that shews that, as the stevedore was to be wholly under the direction of the master, every act of his would have for this purpose to be considered as the act of the master. I do not think that is the meaning and effect of the words. What I think is intended by these words is, that he should be generally under the direction of the master, and not under the direction of the charterer; but it is not intended that every act of his in stowage is to be considered as under the direction of the master. As to the facts, the learned judge in the Court below has found that the plaintiff's goods were improperly and negligently stowed, and that the stowage at Valencia and Almeria was negligently done by the stevedores employed there.

It seems to me that that finding, if it is accepted, disposes of the point; because I think the learned judge did find that the negligence was the negligence of the stevedore, and not the negligence of the master. He draws no distinction between different acts of the two; nor does he say, nor was he asked to say, that both the stevedore and the master were negligent. When we look at the evidence, it appears to me that the finding of the learned judge was amply justified. The very language of the charterparty stipulating that the stevedores should be persons experienced in such matters, and the evidence that the master was not experienced, points to this, that the master did not interfere with the general stowage of the cargo, though he may have done so with regard to some details. Further, when we learn that the master seems to have known very little about the manner of the stowage, I cannot help feeling that that strongly corroborates what I think was the learned judge's view. The master was asked, "Was the ship loaded by the charterers' stevedore?" and the answer is, "Yes." Having given that evidence in chief, he was asked about the matter in cross-examination: "You superintended the whole of the loading?"—"Yes." "Yourself?" —"Except for a few minutes when I had to run ashore for the ship's business." "You told them how to do it?"—"The stevedore stowed it; but I told him sometimes, that he had better do it so-and-so." He was not pressed with regard to any particular act of negligence, whether he was a party to it or not; and the conclusion to which the judge rightly came was that the negligence was the negligence of the stevedore.

If it was the negligence of the stevedore, or, if it was the joint negligence of stevedore and master, the case is brought within the decision in *Hayn* v. *Culliford* (1), where Lord Bramwell said (2): "It is clear that if that is the contract, the defendants are liable on the ordinary contract of a carrier, unless (and there is not) there is some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captains, officers and crews; they do not extend to the acts of the defendants, and their other agents and servants, therefore, not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged." So I think that case is exactly in point.

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(1) 4 C. P. D. 182.

(2) At p. 185.

As to the other point, it is said that this negligent stowage falls within the word "management" in the bill of lading. There appears to be no distinct authority as to the meaning of this word "management" with relation to stowage. Bad stowage, it was admitted in argument, and I think rightly, does not come within the term "navigation." In a case decided by Willes, Keating, and Montague Smith, JJ., *Good* v. *London Steamship Owners Mutual Protecting Association* (1), it is clear from the interpositions of Willes and Montague Smith, JJ., in the course of the argument of counsel, that bad stowage does not fall within bad navigation, unless such stowage affect the safe sailing of the ship. Can it fall under the word "management"? On that there appears to be no distinct authority, because the obiter dictum of Charles, J., which has been referred to, only comes to this—that having a ship in a dirty condition would be bad management. The learned judge did not say bad management of ship within the meaning of a clause like this; and even if he had I should have thought that it was one thing to say that having a ship in a dirty condition is bad management of a ship, and quite another thing to say that bad stowage is bad management of the ship.

A distinction was attempted to be drawn between the two different pieces of negligence and their effects in this case. It is urged that, whatever may be said as to taking in rotten oranges at Almeria, the stowage at Valencia stands in a different position, because that part of the damage was caused by placing boxes in a particular way on the iron girders of the ship. Therefore, it is said that that was bad management of the ship. I confess I see no distinction of that kind. It is clear that taking in rotten oranges was a matter of bad stowage and nothing else, and it appears to me, that, the ship not being improperly constructed, the placing of boxes of oranges near the girders is simply a question of stowage. So it was bad stowage and nothing else. Is that mismanagement of the ship? I think it would be an improper use of language to include bad stowage in such a term. It is not difficult to understand why the word "management" was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation.

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(1) Law Rep. 6 C. P. 563.

I cannot help thinking that, inasmuch as people know perfectly well what is meant by proper or improper stowage, it could hardly be intended to include improper stowage in the bill of lading. The parties would have used the words "stowage" or "improper" stowage, and not allowed the expression of their intention to rest on a strained construction of other words. I think, therefore, on both points that the appeal must fail.

GORELL BARNES, J. In this case the plaintiff's claim is in respect to damage done to a parcel of oranges shipped from Valencia to Liverpool in the defendants' vessel. The point made by the plaintiff in connection with the cause of damage is that the damage was due to bad and negligent stowage. That is the form of the claim made, and the two points of negligence relied on are, first, that these oranges, having been stowed in the vessel, had afterwards had placed above them at Almeria a large quantity of rotten, broken, and dirty boxes of oranges, so that the stowage in that respect was, as the plaintiff says, improper; and further, that part of the oranges were so stowed that the boxes were improperly allowed to come in contact with the angle-irons in the vessel. The learned judge who tried the case has found as a fact that in these two particulars the oranges were improperly and negligently stowed, and that that was done by the stevedore employed by the ship.

The defendants' answer to the case is that the exceptions in the bill of lading protect them from these acts of negligence. The exceptions, so far as material, are "damage or loss by collision, or from any act, neglect, or default of the pilot, master, or

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THE FERRO.

Gorell Barnes, J.

mariners in the navigation or management of the ship." In my judgment, in order to relieve the shipowners from negligence such as that which is found by the learned judge, there ought to be clear and explicit language in the bill of lading.

The plaintiff says that the language used in the exceptions fails in two particulars to cover the negligence in question; first, because the act, neglect, or default excepted is confined to that of the pilot, master, or mariners—that is, so far as persons are concerned; and, secondly, is confined to acts, neglect, or default in the management or navigation of the ship.

As to the first, it seems to me quite clear from the evidence here, especially after the remarks of Mr. Thomas, in which he shewed that the master had never had such a cargo before, and was giving an account as to the stowage which was not accepted by the Court—it seems to me that the stevedore was really the person responsible for this stowage, and that it was his negligence which caused the damage. As the stevedore is not included within the enumeration of the persons excepted, that want of exception in the bill of lading is fatal to the defendants' case.

I think it is desirable also to express the view which I hold about the question turning on the construction of the words "management of the ship." I am not satisfied that they go much, if at all, beyond the word "navigation." Some things may be suggested to which the word "management" is perhaps applicable beyond that of "navigation," but I feel that it is not such clear and expressive language as to include within it the words "improper stowage." It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo.

The first point being that the cargo was damaged by putting bad oranges above it, it seems a perversion of terms to say that the stowage of rotten oranges above sound ones is management of the ship. It is stowage of cargo. Again, as to the cargo being improperly placed against the beams or angle-irons of the ship, if one were in the hold of that ship, and ran one's head against it, it would be a remarkable perversion of terms to say it was improper management of the ship. So it is to say that improper stowage is improper management of the ship. By the use of proper language "improper stowage" can be covered; but, in my judgment, the words "neglect or default in the management of the ship" do not exonerate the shipowners from damage caused by improper stowage. I agree, therefore, that this appeal must be dismissed with costs.

Solicitors for plaintiff: *Alex. Wilson & Cowie, Liverpool.*
Solicitors for defendants: *Ingledew & Rees, Cardiff.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1892
Dec. 9.

THE LANCASHIRE.

Admiralty—Collision—Fog—Regulations for Preventing Collisions at Sea, Art. 18.

By art. 18 of the Regulations for Preventing Collisions at Sea: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

During a fog, in the neighbourhood of the Owers Light, in the English Channel, the whistle of the steamship *A.*, bound eastward, was first heard, by the master of the steamship *L.*, bound westward, a point or a point and a half on his starboard bow, and the sound of the whistle gradually broadened until it reached two and a half to three points on that bow. As the next whistle did not seem to broaden, the master of the *L.* stopped his engines. On hearing the next whistle he was satisfied that the *A.* was porting, and closing rapidly on his starboard bow (as, in fact, she was), and he thereupon reversed his engines.

The two vessels came into collision, though, but for the *A.* porting, they would have passed, starboard to starboard, on nearly parallel and opposite courses. The speed of both vessels was moderate.

In an action of damage, both vessels were held to blame, the *A.* for porting and not stopping, the *L.* for not slackening her speed earlier.

The owners of the *L.* appealed:—

Held, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), that the Court was bound by the decision in *The Ceto* (14 App. Cas. 670), to dismiss the appeal, as, when the *L.* stopped, the indications were not such as to shew to the master of the *L.* distinctly and unequivocally that, if both vessels continued to do what it appeared they were doing (that is, the *L.* proceeding slowly on, and the *A.* porting towards the *L.*) they would pass clear without risk of collision.

APPEAL by defendants, the owners of the steamship *Lancashire*, against so much of the judgment of Gorell Barnes, J., dated

C. A.
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THE LANCASHIRE.

July 6, 1892, as pronounced that those in charge of their vessel were partly to blame for a collision with the steamship *Ariel*, owned by the plaintiff.

The facts—so far as material—were shortly as follows:—

On June 10, 1892, about 8 P.M., the plaintiff's screw steamer *Ariel*—of 1452 tons nett, and 2020 tons gross, register, a crew of twenty-five hands, four passengers, and a cargo of about 2950 tons of wheat, from Varna to Hamburg—was in the neighbourhood of the Owers lightship in the English Channel. The weather was foggy, with a light W.S.W. breeze, the tide about one hour flood running to the eastward at about one to one and a quarter knots per hour. The vessel (according to the evidence of her master) was on a course E. by S., going dead slow, at about two knots an hour through the water, and her whistle was being sounded, when, at 8.5, a steam whistle was heard apparently right ahead, and a long way off. After listening for about ten minutes to the sound of the approaching whistle, her master ported one point, bringing the whistle on the port bow. About five minutes later, having steadied at E.S.E., a steamer (which proved to be the *Lancashire*) was seen about two points on the port bow, and a length or two off. The master of the *Ariel* thereupon reversed the engines and put the helm hard-a-port, which brought him about half a point more to the southward; but the two vessels came into collision, about nine miles E.S.E. of the Owers, the *Lancashire* with her stem striking the *Ariel* about fifteen feet abaft the stem on the port bow, and doing so much damage that, at about 3.40 on the following morning, the latter vessel sank some twelve miles E.S.E. of the Owers.

The defendants' screw steamer *Lancashire*, of 2712 tons nett, and 4193 tons gross, register, with engines of 500 horse-power nominal, and a crew of ninety-five hands, was proceeding down Channel on a voyage from London to Liverpool, with a cargo of about 3500 tons. At 5.7 P.M., she was abeam of Beachy Head, on a course N. 82° W. magnetic. At 6.15 her master first noticed some fog ahead; ten minutes later he gave the order to stand by, and to stream the log. At 6.30 he ordered the engines to be slowed, doubled the look-out, and stationed a man at the steam

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THE LANCASHIRE.

whistle. At 6.35 he proceeded dead slow, making about three and a half knots through the water. At 7.46 he heard a steam whistle a point, or a point and a half, on his starboard bow, and shortly after the look-out man rang two bells, the signal for a starboard hand vessel. The master repeated the order "Dead slow," and the whistle continued to be heard, gradually broadening to some two and a half to three points on his starboard bow. Then a whistle aroused his suspicions, as, instead of continuing to broaden, it seemed to come from the same direction as the previous whistle. He thereupon stopped his engines, and, as the next blast satisfied him that the other vessel was porting and closing rapidly on his starboard bow, he reversed his engines full speed. After two more blasts the *Ariel* came in sight, about 150 yards off, two and a half to three points on the starboard bow, and crossing him at an angle of about forty degrees. About five to seven seconds before the collision, the master of the *Lancashire* gave an order to starboard, with the view of canting his head in that direction, as he was going astern; but it had no effect on the vessel, which was practically on her original course, when at 8.7 the collision occurred in the way already described.

The learned judge (Gorell Barnes, J.), in the Court below, found both vessels to blame, the *Ariel* for porting, and not stopping, and, with reference to the *Lancashire*, said:—

"Now I come to what, I think, is the most serious point in this case in connection with the *Lancashire*—that is to say, whether or not the *Lancashire* complied with art. 18 (1), having regard to the fact that the vessels were obliged to navigate in that state of weather under the provisions of art. 13. (2) Now, that seems to me the most difficult question in this case. I think the answer depends upon the position of the vessels at the time they were approaching each other, and I have come to the conclusion that this position is in substance that which was stated by the witnesses from the *Lancashire*, that is to say—repeating it very shortly—that the whistle was originally made

(1) Regulations for Preventing Collisions at Sea, 1884, art. 18: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

(2) Ib., art. 13: "Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed."

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out on board the *Lancashire* from the *Ariel* at a point or a point and a half on the starboard bow of the *Lancashire*, and that the vessels really were in fact in a position to pass starboard side to starboard side. I think this also follows from the fact that, as I have found, the *Lancashire* did not starboard, and the *Ariel* admittedly ported, and ported, I think, somewhat more than her witnesses are willing to admit. And, having regard to those facts, and the angle of the blow, it seems to follow that the vessels must have been starboard to starboard, and would have so passed, in fact, if the *Ariel* had not altered her course. The fact, however, of passing starboard to starboard if the *Ariel* had not altered does not entirely dispose of this point, because, if one looks at the decisions which have been brought to my attention, and especially to the decision in the case of *The Ceto* (1), the question still has to be determined which I have thought it right to put to the Elder Brethren of the Trinity House, and that question is one I think of nautical skill, and the answer to it is really the basis of my judgment, so far as the *Lancashire* is concerned. I am guided on this point by the advice which I have received. The question is the following: 'Were the indications by the whistle from the *Ariel*, under the circumstances which I have stated, such as to convey distinctly to a master of reasonable skill, in the locality in which the vessels were, that the two vessels were so approaching that they would pass well clear of each other without risk of collision, until the *Ariel* ported?' The answer to that question given me by the Elder Brethren is in the negative. They think that the indications were not sufficient to convey distinctly to the master, to state it shortly, that there was no risk of collision in keeping on in the way in which he was proceeding; and it follows from that—and in this the Trinity Masters agree with me—that the *Lancashire*, having regard to the answer which is given to that question, based upon the original fine position in which the *Ariel* was heard ahead, on the starboard bow, should have stopped her engines and possibly gone on at a reduced speed again, but have slackened her speed, certainly, at a time before she did; and on the grounds which I have stated, because there is no doubt that she kept on at a speed of somewhere about three and a half knots up to the time when the vessels were very close to each other, I think that the *Lancashire* must be found to blame."

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(1) 14 App. Cas. 670.

On appeal:—

Sir R. E. Webster, Q.C., and *Bucknill, Q.C.* (*A. D. Bateson*, with them), for the appellants (defendants). As the owner of the *Ariel* has not appealed, the sole question for the consideration of the Court is whether the defendants' vessel, the *Lancashire*, was bound to slacken her speed earlier than she did. The evidence shews that, whilst the master of the *Lancashire* was proceeding dead slow, he heard the whistle of the *Ariel* fourteen or fifteen times broadening on his starboard bow. These signal warnings, prescribed by art. 12 of the regulations, the master of the *Lancashire* carefully noted, and, so long as the whistle continued to broaden, there was no obligation on the master of the *Lancashire* to stop and reverse, for, until the *Ariel* improperly ported, there was no indication of risk of collision. Then, immediately the first sound of the whistle seemed to shew that the *Ariel* was not broadening, the master of the *Lancashire* stopped, and, the next sound of the whistle being rather finer on his bow, the engines of the *Lancashire* were reversed full speed. The defendants contend that their master drew the proper conclusion, and, as he stopped as soon as the state of things was altered, and there was an indication of risk of collision, and then, when it became necessary, reversed, he thereby complied strictly, both with the terms of art. 18 of the Regulations for Preventing Collisions at Sea, and with the interpretation put upon that article by the decided cases. It is submitted that the question asked of the Elder Brethren of the Trinity House, who were assisting the learned judge in the Court below, puts the test too high as it is thrown into the negative form: whether the indications were "that the two vessels were so approaching that they would pass well clear of each other without risk of collision." The effect of the judgment based upon the answer to that question has imposed a new course of conduct upon masters navigating in a fog, which is not justified by the regulations, and the question should have been put affirmatively in the terms of art. 18, viz.: whether the indications were "that the two vessels were so approaching as to involve risk of collision." The time, also, involved in the question is too early, as the wording is "*until* the *Ariel* ported"; but the *Ariel* steadily broadened up to three points, and it was only *after* the *Ariel* improperly ported that any risk of collision arose, and then the *Lancashire* immediately stopped.

[KAY, L.J. In *The Ceto* (1) Lord Watson says (2): "When two steamships, invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer until they are within a few ships' lengths, they are, in my opinion, within the second direction of rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision."]

That case is distinguishable because the vessels were, at the material time, on crossing courses, and there were indications to both vessels that there was risk of collision. The opinion, also expressed by Lord Watson, cannot be treated as a general proposition, but must be limited to the circumstances of that case; for the learned Lords, who were in a majority in deciding that case, can hardly have intended that their words should be read to the extent of compelling the master of a steamship to reverse before there are any indications of risk of collision.

Here the two vessels were within three degrees of parallel and opposite courses, and their combined speed was only about seven knots. They were three-quarters of a mile apart when the *Lancashire* stopped, half a mile apart when her engines were reversed, and four and a half minutes elapsed before the collision, from the last whistle, previous to that which aroused the master's suspicions.

In art. 12 of the preliminary Act, the question is, "What measures were taken, and when, to avoid the collision?" This is answered thus: "When two succeeding blasts were heard, proceeding apparently from the same position on the starboard bow of the *Lancashire*, her engines were stopped. As soon as

(1) 14 App. Cas. 670.

(2) At p. 686.

the next whistle was heard apparently closing, the engines were put full speed astern." This answer is fully borne out by the evidence, and shews the maximum of care that can be demanded under the circumstances.

[LORD ESHER, M.R. The learned judge in the Court below seems to have taken the question, put to the Trinity Masters, from the judgment of Lord Herschell, who says (1): "I think that when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another."]

No doubt a duty is cast upon a master to take the way off his ship, but he must not act as if he were certain that there was risk of collision when the indications are not of that nature. There are two duties imposed by art. 18, neither of which comes into operation until something happens: the first duty is to slacken speed when the vessels are approaching so as to involve risk of collision. The *Lancashire* was going as slow as it was possible to go to keep her under command; the only way of slackening was by stopping. This she did at a distance of between three-quarters and half a mile on the first indication of risk of collision. The second duty is not only to stop, but to reverse if necessary. This was done the moment the whistle, which followed the suspicious whistle, indicated that the *Ariel* was closing.

It is submitted that no blame attaches to the *Lancashire*, as there is no hard and fast rule; each case depends on its circumstances, as has been laid down in a more recent case than *The Ceto* (2), with regard to an alteration of the helm in a fog: *The Vindomora.* (3)

Pyke, Q.C., and *T. F. Dawson Miller* (*Sir Walter Phillimore*, with them), for the respondent (plaintiff), the owner of the *Ariel*, were not called upon.

LORD ESHER, M.R. I think we are bound by the decision of the House of Lords in *The Ceto.* (2) It is clear that the second

(1) *The Ceto*, 14 App. Cas. 670, at p. 695.
(2) 14 App. Cas. 670.
(3) [1891] A. C. 1.

whistle, heard on the same bearing as the one before, shewed, considering the way in which the vessels were approaching, that the *Ariel* had ported. Then we have asked our assessors this question: "When the *Lancashire* stopped, were the indications such as to shew to the captain of the *Lancashire*, distinctly and unequivocally, that, if both vessels continued to do what it appeared they were doing (that is, the one proceeding slowly on, and the other porting towards the other), they would pass clear without risk of collision?"

The answer is, "No."

I think, therefore, that in obedience to the decision of the House of Lords, it was not wrong for the learned judge in the Court below to find that the *Lancashire* was also to blame.

I must say I think that this construction of the rule, so far as it relates to steamers approaching each other in a fog, is one which nobody had enunciated before, but which is binding upon this Court.

LOPES, L.J. I am of the same opinion. We are bound by the decision of the House of Lords in *The Ceto*. (1)

KAY, L.J. I agree. There are two alternatives prescribed by the rule, and, in the circumstances, according to the construction put upon the rule in *The Ceto* (1), the master of the *Lancashire* was bound to stop and reverse. He did not reverse. He only stopped. It seems to me, therefore, that he is to blame for not obeying the rule.

Appeal dismissed.

Solicitors for appellants (defendants): *Pritchard & Sons, for Bateson, Warr, & Bateson, Liverpool.*

Solicitors for respondent (plaintiff): *William A. Crump & Son.*

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(1) 14 App. Cas. 670.

T. L. M.

ROE *v.* NIX AND OTHERS.

1892 *Dec.* 9.

Probate—Will—Testamentary Capacity—Lunatic so found by Inquisition—Evidence—"Chancery Visitors'" Reports—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 184, 185, 186—*Costs.*

By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184, the "Chancery visitors" shall visit lunatics so found by inquisition and make inquiries as to their mental and bodily health and otherwise respecting them. By s. 185, the Chancery visitors shall respectively make reports on any cases to the Lord Chancellor. By s. 186, (1.) the reports of the Chancery visitors shall be filed and kept secret in their offices and shall not be open to the inspection of any person save the members of the board of visitors and the judge in lunacy and such persons as he specially appoints. (2.) All the reports relating to any particular patient shall be destroyed on his death. . . .

In an action to obtain probate of the will of a lunatic so found by inquisition two of her next of kin opposed probate on the ground of her insanity at the date of the will. The chairman of the Board of Chancery Visitors was examined on behalf of the defendants, and admitted that the reports made by himself and his colleagues were still in existence, but refused to produce them on the ground that he was precluded by s. 186 of the Act of 1890 from making them public:—

Held, by Gorell Barnes, J., after consultation with Esher, M.R., and Lindley, Bowen, Lopes, and Kay, L.JJ., that the reports must be treated as non-existent, and that no order could be made for their production.

The jury having found for the will, probate of it was granted, and the Court, on the authority of *Davies* v. *Gregory* (Law Rep. 3 P. & D. 28), allowed the costs of all parties out of the estate.

THIS was a probate action in which the plaintiff, Robert Harvey Roe, a legatee and brother of the deceased, propounded the last will and testament of Ellen Roe, late of St. Ann's Heath Sanatorium, Virginia Water, in the county of Surrey, bearing date September 18, 1891, together with "directions" added thereto and executed a few days later, and a codicil dated October 7, 1891. The defendants, Benjamin Woodall Nix and Walter Frederick Geare, set up in the alternative earlier wills, dated September 16, 1889, and March 19, 1889, of which they were jointly or severally executors; and the other defendants, Mrs. May Matilda Sparks and Mr. James Talboys Wheeler, pleaded in opposition to all these papers undue influence and testamentary incapacity.

The deceased, who died of cancer in December, 1891, was found of unsound mind on inquisition on February 1, 1884. Mr. John Sparks, husband of Mrs. May Matilda Sparks, her sister, was appointed committee of her estate; and Mrs. Wheeler, another sister, and afterwards Miss Wheeler, her niece, was appointed committee of her person.

The real question at issue in the suit was whether, as was alleged by the defendants Sparks and Wheeler, from the date when she was found of unsound mind by the inquisition, which had never been superseded, the testatrix was mentally incompetent to make any testamentary disposition of her property, and whether she was all the time dominated by an unfounded hatred and insane delusion with regard to her two sisters and their families.

The case was tried before Gorell Barnes, J., and a special jury.

Inderwick, Q.C. (*B. Deane*, and *Eustace Smith*, with him), for the plaintiff.

Bayford, Q.C. (*Geare*, with him), for the defendants Nix and Geare.

Crump, Q.C. (*Searle*, with him), for the defendants Sparks and Wheeler.

Among other witnesses examined on behalf of the defendants were several members of the Board of Visitors, whose duty it is periodically to visit and report upon the condition of the Chancery lunatics, and who at intervals from the year 1884 down to the date of her death had visited Miss Roe.

Mr. Palmer, the chairman of the board of visitors, in the course of his cross-examination, stated that the reports made by himself and his colleagues were still in existence; whereupon Inderwick, Q.C., called for the production of those reports for the years during which the testatrix made the wills in question; but Mr. Palmer replied that he was precluded from making them public by the terms of s. 186 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and that in any event he could not produce the reports without an order of Bowen, L.J., who had special charge of Miss Roe's affairs.

B. Deane, and *Searle*, thereupon, by leave of the Court, and with the consent of all parties, went to the Lord Justices' Court to make an application to Bowen, L.J., to permit Mr. Palmer to produce these reports.

On their return,

B. Deane, reported to the Court that he had made the application to Bowen, L.J., and Lindley, L.J., who had refused to make any order, and had pointed out that, by s. 186 of the Lunacy Act of 1890, these documents ought to have been destroyed on the death of the lunatic.

GORELL BARNES, J. It is most desirable that these reports, which contain the best evidence that could be given of Miss Roe's condition at the time, should be before the jury, and, if all parties desire it, I will myself consult the Lords Justices.

On his return,

GORELL BARNES, J., said: I have seen both the Lords Justices, and they thought the matter of such great importance that they asked the opinion of the Master of the Rolls and of Lopes and Kay, L.JJ. All five concurred in the view that the reports, though existing, must be treated as destroyed on the death of the patient; and, further, that, even on a subpœna, the witness would be bound by the section to treat the reports as destroyed. Unfortunately, therefore, we cannot see these reports.

At a subsequent stage of Mr. Palmer's cross-examination,

GORELL BARNES, J., said: There appears to be no section in the Act which prevents a witness called on subpœna, who had seen the patient, giving evidence of her condition. The object of producing the reports would be that the Court and jury might see whether the memory of the witness was accurate. The reports, per se, would not be evidence.

In the end the jury found that the testamentary papers of the year 1891 were duly executed, and that the testatrix was of sound mind, memory, and understanding at the time of their execution.

Gorell Barnes, J., thereupon pronounced for the will of September, 1891, the executed "directions," and the codicil of October, 1891; and, on the authority of *Davies* v. *Gregory* (1), ordered the costs of all parties to be paid out of the estate.

Solicitors for plaintiff: *Hewitt & Farman.*

Solicitors for defendants, Nix and Geare: *Geare, Son & Pease.*

Solicitors for defendants, Sparks and Wheeler: *Cole & Jackson; Stevens, Bawtree, & Stevens.*

W. L.

1892
Sept. 2.

[IN THE CONSISTORY COURT OF LONDON.]

In re ST. NICHOLAS COLE ABBEY.
In re ST. BENET FINK, CHURCHYARD.

Ecclesiastical Law—Faculty—Jurisdiction—Discretion of Ordinary—Churchyard closed for Burials under Order in Council—Private Act vesting Churchyard in Corporation of City of London—1 & 2 Vict. c. c.—5 & 6 Vict. c. ci.—Faculties for Excavation of Chambers in Churchyards, and for user of same for Storing and Working Apparatus for the transformation of Electricity.

In two cases of faculty it appeared that for the purpose of lighting two districts in the City of London with electric light, it was necessary that underground chambers should be constructed in two closed churchyards in the districts, there being no other places suitable for their construction, and that it was in the interest of the parishioners and public that electric light should be introduced in the districts:—

Held, that the Court had jurisdiction in its discretion to decree a faculty on each case authorizing the construction of such a chamber in the churchyard, and the use of the same as a transformer chamber for the term of twenty-one years, subject to payment of a yearly rent to the rector and churchwardens of the parish.

A local Act of Parliament provided that part of the parish church of St. Benet Fink in the City of London, and one-third part of the burial-ground of that parish, might be taken for the purposes of the Act after notice, and should be vested in the Corporation of the City of London, on such payment being made as in the Act mentioned. By a subsequent local Act it was provided that, on complying with certain directions therein contained, the Corporation might take down the parish church of St. Benet Fink, or the part thereof not taken down under the last-mentioned Act, and the site thereof, and the ground and soil thereof, and also the then present burial-ground of

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(1) Law Rep. 3 P. & D. 28.

1892

IN RE ST. NICHOLAS COLE ABBEY.

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the said parish, and the freehold of the same in fee simple should be vested in the Corporation free from all trusts and incumbrances whatsoever; and that as soon as the site of the said church and the said burial-ground should be cleared, such portion of the same as was not otherwise appropriated under the Act, should remain for ever unbuilt upon, and unappropriated to any purpose except such ornamental purpose as the Corporation, with the consent of the Bishop of London, might direct.

After the provisions of these Acts as to the vesting of the churchyard of St. Benet Fink had become operative, the Corporation of the City of London and the rector of the united parish of St. Peter-le-Poer with St. Benet Fink, and the churchwardens of St. Benet Fink, petitioned the Court to decree a faculty for the construction in the churchyard of St. Benet Fink of an underground chamber to be used for the transformation of electricity:—

Held, that the Court was not precluded by the local Acts relating to the churchyard from granting the faculty prayed for.

IN RE ST. NICHOLAS COLE ABBEY.

THIS was a cause of faculty promoted by the rector and churchwardens of the parish of St. Nicholas Cole Abbey, in the City of London, for the purpose of obtaining a faculty authorizing the City of London Electric Lighting Company, Limited, with the concurrence of the petitioners, to excavate a portion of the churchyard of St. Nicholas Cole Abbey, and to construct therein a transformer chamber or vault, and a ventilating shaft for the same, and to place therein the necessary apparatus for the transformation of electricity, such apparatus to be used by the company for the transformation of electricity for the period of twenty-one years, or such further or other period as the Court might order.

1892. August 29. The suit was now heard before the Chancellor of the diocese of London, Dr. Tristram, Q.C.

Arnold Statham, appeared for the petitioners.

The grant of the faculty prayed for was not opposed.

Witnesses were orally examined on behalf of the petitioner. The result of their evidence is stated in the judgment.

Cur. adv. vult.

IN RE ST. BENET FINK, CHURCHYARD.

In this case,—a cause of faculty promoted by the mayor, commonalty, and citizens of the Corporation of London, and the rector of the united parish of St. Peter-le-Poer with the perpetual curacy of St. Benet Fink annexed, and the churchwardens of St. Benet Fink, a faculty was prayed authorizing the construction in the churchyard of St. Benet Fink of a similar chamber to that the construction of which was proposed in the above case of *In re St. Nicholas Cole Abbey* (1), and the user of the same by the City of London Lighting Company, for the transformation of electricity for the period and under the conditions referred to in the judgment.

1892. August 29. The suit was heard by the Chancellor of the diocese of London, Dr. Tristram, Q.C.

Witnesses were examined orally in support of the petition. The result of their evidence is stated in the judgment.

Arnold Statham, for the petitioners. The parish church of St. Benet Fink was pulled down under the provisions of two local Acts of Parliament. The first of these Acts, 1 & 2 Vict. c. c. (2), an Act for improving the site of the Royal Exchange and the

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(1) Ante, p. 59.

(2) The 1 & 2 Vict. c. c., after reciting (inter alia) that the Royal Exchange, in the City of London, had been recently destroyed by fire, and that it would be of great advantage to the public if an enlarged site were provided for the said Royal Exchange, and if the streets and avenues adjoining the same were widened and otherwise improved, provides in s. 54 as follows:—"That it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, at any time within four years from the passing of the Act, with the consent of the Lord Bishop of London . . . . first had and obtained, to take or use for the purpose of the Act the steeple of the church and part of the burial-ground of the parish of St. Benet Fink, in the City of London, extending from north to south on the west side thereof, not exceeding one-third part of the said burial-ground, at the expiration of three months next after notice for such purposes shall have been given to the rector for the time being, and affixed on the door of the said church, of the intention to take down the said steeple, the said mayor, aldermen, and commons assembled . . . . removing and carrying at their own expense the remains of any person or persons interred or deposited in the aforesaid part of the said burial-ground which may be disturbed . . . . to the remaining part of the said burial-ground, and the site of the said steeple of the said church and such part of the said burial-ground as aforesaid, shall be and become vested in the said mayor and commonalty and citizens and their successors for the purposes of this Act, immediately on payment to the Lord Archbishop of Canterbury and the Lord Bishop of London for the time being respectively of the sum of two thousand pounds. . . ."

1892

In re St. Nicholas Cole Abbey.

In re St. Benet Fink, Churchyard.

avenues adjoining thereto, authorized the steeple of that church being taken down, and provided that one-third part of the burial-ground of that parish might be used for the purpose of that Act. By the second Act, the 5 & 6 Vict. c. ci. (1), the residue of the burial-ground is dealt with, it being therein provided that the then present burial-ground of St. Benet Fink should vest in the Corporation of London, and might be used for the improvements to be made under that Act, whilst any portion not used under the Act should be fenced round and "remain for ever unbuilt upon and unappropriated," except for such

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(1) The 5 & 6 Vict. c. ci., an Act for further extending the approaches to London Bridge, and the avenues adjoining to the Royal Exchange, in the City of London, and for amending the Acts relating thereto respectively, &c., enacts in ss. 13 and 17 respectively, as follows:—

Sect. 13: "And be it further enacted that it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, at any time within five years from the passing of this Act, at the expiration of three calendar months next after notice for that purpose shall have been given to the incumbent for the time being, and affixed on the door of the said church of St. Benet Fink, of the intention to take down the same or so much thereof as has not been taken down in pursuance of the said recited Act of the 1st and 2nd years of the reign of her present Majesty, to cause, with the consent in writing of the Bishop of London for the time being under his hand first obtained, to be taken down the said parish church of St. Benet Fink, or such part thereof as aforesaid, and upon the expiration of such notice as aforesaid the materials of the said parish church or the part thereof so to be taken down, and the site thereof, and the ground and soil thereof, and also the present burial-ground of the said parish, and the freehold and inheritance of the same in fee simple, shall be and are hereby vested in the said mayor and commonalty and citizens of the City of London, their successors or assigns, free from all trusts and incumbrances whatsoever."

Sect. 17: "And be it further enacted, that so soon as the site of the said church and the said burial-ground shall be cleared for the purposes of this Act, the said mayor, aldermen, and commons, in common council assembled, shall cause the same, except such part thereof as shall be laid into the streets or public ways, or appropriated for parsonage houses as hereinafter mentioned, to be enclosed by a substantial iron railing or other suitable fence; and the residue of the said site and burial-ground shall remain for ever unbuilt upon and unappropriated to any purpose except such ornamental purpose as the said mayor, aldermen, and commons, in common council assembled, with the consent of the Bishop of London for the time being, signified by writing under his hand, shall think fit to direct."

[By a subsequent section of the Act, lands dealt with under the Act might be appropriated for the parsonage houses of St. Margaret, Lothbury, and St. Peter le Poer.]

"ornamental purpose" as the Corporation of London, with the consent of the Bishop of London, should think fit to direct. A portion of the churchyard was never used under either of these Acts, and has been fenced round, and the Corporation of London, with the other petitioners in this case, now apply to the Court to grant a faculty for the construction in such disused and unappropriated portion of the churchyard of a chamber, entirely under the surface of the ground, to be used for the storing and working by the City of London Electric Lighting Company of an apparatus for the transformation of electricity; the only alteration intended in the appearance of the churchyard being that the vault will be wholly or in part covered with glass. This being the object of the application, it is submitted that there is nothing in 5 & 6 Vict. c. ci., or in the other Act above referred to, to oust the jurisdiction of this Court. It is true that the site of the churchyard is vested in the Corporation of the City of London; but the Acts must be construed as only vesting the site in the Corporation for the carrying out of the improvements authorized under the Acts. Even, however, if this is not so, nothing but the site is vested in the Corporation, and the Legislature never could have intended to interfere, and have not interfered, with the jurisdiction of the Court over the vaults undoubtedly existing in the portion of the churchyard not taken and used under either of the Acts. Moreover, all that is intended to be done under the faculty, if granted, will contribute to the ornamentation of the City of London, and may therefore be claimed as within the spirit of the exception in 5 & 6 Vict. c. ci., s. 17, above referred to. The jurisdiction of the Court to grant the faculty remaining unaffected by any statutory provisions, the petitioners are in the same position as the petitioners in the recent cases of *In re St. Benet Sherehog* (1) and *In re St. Nicholas Acons* (1)—in which it was held that the Court might, in its discretion, grant faculties for the placing in disused churchyards of somewhat similar constructions, to be used for objects beneficial both for the parishioners and the public. It is clear in the present case that the discretion of the Court ought to be exercised in favour of the petitioners, on the ground of the great convenience of allowing the City of London Electric Lighting Company to carry out the contract they have with the Corporation of the City of London for lighting the streets in the district in which the churchyard of St. Benet Fink is situate, and of the great inconvenience which would be suffered by the parishioners if the faculty was refused.

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(1) Post, p. 66, note.

The grant of the faculty was not opposed.

Cur. adv. vult.

1892. Sept. 2. DR. TRISTRAM, Q.C. On August 29 last, application was made to this Court to authorize, by faculty, the construction of transformer chambers or vaults in two city churchyards long disused for burials — one in the churchyard of St. Benet Fink, close to the Royal Exchange, and the other in the churchyard of St. Nicholas Cole Abbey, in Queen Victoria Street—for the use of the City of London Electric Lighting Company, Limited, to enable the company to introduce electric lighting into those parts of the city in which these churchyards are situated.

The construction of these chambers will involve the disturbance of human remains, and their removal and reinterment in some other consecrated burial-ground.

The petitioners for the faculty for the construction of a chamber in the churchyard of St. Benet Fink are the mayor and corporation of London, and the rector and churchwardens of the parish, and the petitioners in the case of St. Nicholas Cole Abbey are the rector and churchwardens of the parish.

Each of the applications is supported by resolutions of the vestries of the respective parishes, passed unanimously. Certain of the facts adduced by the petitioners in support of the granting a faculty are common to both applications.

It appears that the City of London Electric Lighting Company was established by Act of Parliament with the object of lighting the streets, offices, and houses in the City with electric lights, with a nominal capital of 800,000*l.* The company, in furtherance of this object, has during the last twelve months expended 350,000*l.*, and has contracted with the Corporation of

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London to light the streets of the City for an annual payment of 20,000*l.* on the completion of the system.

The then existing site of the churchyard of St. Benet Fink was, by a local Act of Parliament (5 & 6 Vict. c. ci.), vested in the mayor and corporation of London, with a view to extend the avenues adjoining to the Royal Exchange, and a portion of the site was appropriated under the Act for that purpose.

By this Act, the Court is precluded from dealing with the site of the churchyard, and the corporation have now no power to deal with the vaults underneath the site, and, the vaults being in consecrated ground, this Court has jurisdiction to make such orders in relation to them as the circumstances of the case may require.

The question is whether the Court has, under the circumstances of these cases, discretionary power to make the orders asked for.

In support of the first application—that relating to the churchyard of St. Benet Fink—the following facts appeared in evidence. By the construction of the chamber the company will be enabled to light an area comprising Cornhill, part of Bishopsgate Within, Threadneedle Street, part of Old Broad Street, Throgmorton Street, and the lesser thoroughfares leading between these streets. For the purpose of lighting this area, 7000 incandescent lamps have already been applied for, including 1200 lamps by the Bank of England. To light this area it is necessary that the company should have a transformer chamber within fifty yards, at least, of St. Benet Fink churchyard. The Commissioners of Sewers have already granted permission to the company to erect transformer chambers in narrow thoroughfares in other parts of the City, but have refused permission in the present case, as its construction would disarrange the telephone and telegraph and gas and water companies' pipes; and, owing to the site required being a crowded thoroughfare, it would be, for other reasons, objectionable. The company has also approached owners of adjoining properties with a view to arrange for the purchase of the site required without success. They have no compulsory powers to compel a sale of land for the purpose under their Act, and, in the result, if this application were to fail, the area in question would remain unlighted by electric light. The petitioners have thus made out a strong case of urgency in the interests of the parishioners and public in favour of their application. It also appears that several applications have been made to the company to light the City churches for Sunday evening services, which are well attended, and it is, therefore, against the interests of the Church that the scheme should fail. The company also offer for the concession, if made, the payment of 25*l.* per annum to be appropriated towards the church expenses of the parish church.

The special facts in support of the application in the case of St. Nicholas Cole Abbey are equally cogent. The church and churchyard abut on Queen Victoria Street. Part of the churchyard was many years ago appropriated, under an Act of Parliament, for the construction of the District Railway. The chamber required cannot be constructed under the street owing to there being a subway for the supply-pipes of the water and gas companies, and the company have failed to acquire a site by private purchase. The proposed chamber will supply from 20,000 to 25,000 incandescent lamps, and the company have already applications for 5000 lamps. The church is lighted with electric light, and the company offer for the concession, if made, an annual payment of 30*l.* towards the church services. If the faculty is refused, the electric lighting of the church will cease. The area to be lighted from this chamber will be the whole of Queen Victoria Street as far east as Cannon Street, a great portion of Upper Thames Street, Knight Rider Street, and the lesser intervening thoroughfares.

The refusal to grant the faculties asked for will deprive the streets and houses and offices in the areas mentioned of the advantage of being lighted by electric light, and the question before the Court is whether it has a discretionary jurisdiction in the matter, and, if it has, whether it would be a proper exercise of it to grant the faculties prayed. It has already granted two faculties to this company, giving it the use for twenty-one years of portions of two churchyards in the City for the construction of entrances and subways to transformer chambers, constructed by permission of the Commissioners of Sewers under narrow

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streets, in the cases of *In re St. Benet Sherehog* and *St. Nicholas Acons.* (1) This case does not come within the class of cases

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(1) [In the Consistory Court of London.]

In re St. Benet Sherehog.
In re St. Nicholas Acons.

April 6, 1892.

These were two causes of faculty instituted, one on behalf of the rector and churchwardens of the parish church of St. Benet Sherehog, in the City of London, and the other on behalf of the rector and churchwardens of the parish church of St. Nicholas Acons, also in the City of London. Both suits were brought for the purpose of obtaining faculties to authorize the City of London Electric Lighting Company, Limited, to construct flights of steps with entrances thereto in portions of the disused churchyards of the two parish churches; such stairs and entrances to be used exclusively by the City of London Electric Lighting Company for a period not exceeding twenty-one years, to give access to chambers to be formed by the company underneath the public streets adjoining the said churchyards, each chamber to contain apparatus for the transformation of electricity.

April 6, 1892. The causes were heard on oral evidence before the Chancellor of London (Dr. Tristram, Q.C.).

Arnold Statham, appeared for the rector and churchwardens of St. Nicholas Acons.

No person appeared to oppose the grant of the faculties prayed for.

Dr. Tristram, Q.C. There is no precedent for the granting of a faculty under the circumstances mentioned in the two cases now before the Court.

Two questions arise on the present applications. The first question is, whether it is within the discretionary jurisdiction of the Court to grant the faculties asked for upon the facts proved. The second question is, whether, if it is within its discretionary jurisdiction, the granting of the faculties would, upon the facts proved, be a proper exercise of such discretion.

The Court has undoubtedly jurisdiction to grant by faculty the user of a way across a churchyard for public convenience or to an individual for private convenience, provided no detriment will thereby accrue to the parishioners. When it grants the user of a way by faculty for private convenience to an office or house, it requires the payment to the rector or vicar of an annual sum for the accommodation conceded.

The present applications are made by the rectors of the two parishes, with the sanction of the parish vestries, but at the instance of the City of London Electric Lighting Company, Limited, not for the user of a way across these two churchyards, but for leave to construct a flight of steps with an entrance thereto underneath the edge of each of the churchyards, with the exclusive user of such entrance and steps, in order to give the company access to chambers or vaults which it proposes, with the sanction of the Commissioners of Sewers, to construct underneath the narrow street abutting on each churchyard, for the storage of an apparatus for converting electricity with a view to enable the company to introduce electric lights into the neighbouring offices.

On the first question I would ob-

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referred to in *Reg.* v. *Twiss.* (1) The rule applicable to this and kindred cases is thus laid down by Sir John Nicholl: "Faculties

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serve, that if the Court has jurisdiction to grant a faculty to give the user of a way across a churchyard, it must equally have jurisdiction to grant the user of a way underneath a portion of a churchyard.

The Court being of opinion that it is within its discretionary jurisdiction to grant a faculty for constructing a flight of steps underneath a churchyard with an entrance thereto, for the object named, it remains for it to consider the second question, namely, whether from the facts proved it ought to exercise such discretion in the present cases. I have had the advantage of inspecting these churchyards, accompanied by Major-General Webber, R.E., the consulting engineer of the company; and it occurred to me during the inspection, as it is proved by evidence, that if the faculties are refused the company would be unable to introduce electric lights into the offices of this part of the City, unless it were to construct entrances in these narrow streets, which Major-General Webber says in his evidence would be an intolerable inconvenience to the public; or unless it were by purchase to procure a right of entry to the chambers from one of the opposite houses, and this it might be unable to do without a private Act of Parliament. It is clearly, therefore, for the convenience of the parishioners that the faculties should be granted.

The granting of the faculties will be no detriment to the parishioners, or to those interested in the churchyards. In St. Nicholas Acons the burials were all in vaults, and the proposed erections, as modified by the Court, cannot possibly interfere with these vaults. In the case of St. Benet Sherehog, the erection is so near the edge of the churchyard that it is not probable that it will necessitate the interference with any human remains. If it does do so, the matter must be referred to the Court for further directions.

With regard to the payment of 5*l.* a year, proposed to be made by the company in respect of St. Benet Sherehog, it is proved by the rector's evidence, and the production of the churchwardens' account-books, that all emoluments arising from the churchyard are payable to the rector. The rector is prepared to assent to the payment being expended in keeping the churchyard in order. The faculty will, therefore, authorize the payment to be so dealt with during his incumbency, and afterwards to be dealt with as his successors may direct.

With regard to the voluntary payment proposed to be made to the churchwardens of St. Nicholas Acons, to be appropriated towards keeping the church and churchyard in repair, different considerations apply. It appears that a sum of 300*l.* a year was formerly paid to the churchwardens, partly in rents for houses adjoining the churchyard, and partly for the enjoyment of lights into the churchyard from other houses, which had been appropriated towards church expenses and for other parochial purposes, and the churchwardens loudly

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(1) Law Rep. 4 Q. B. 407.

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are to be granted at the discretion of the Ordinary, but it must be a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned: if an unsound discretion be exercised, a party may appeal to a superior tribunal": *Butt* v. *Jones*. (1)

The Court is of opinion that it would not be exceeding its jurisdiction in granting the faculties prayed, and that under the exceptional circumstances of these two cases it will be exercising a sound discretion in granting them. It, therefore, decrees the faculties as prayed. The faculties not to issue for fifteen days, and during such time advertisements to be inserted in the *Times* and *City Press* to enable families of persons buried in the vaults to make application to me in chambers relating to their removal. A proviso will be inserted in the faculties permitting the removal of remains, if desired by members of the families, to any consecrated burial-ground selected by them. The other remains will

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complain of the great injustice which has been perpetrated under the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36) in enabling the Charity Commissioners to appropriate the whole of this fund, thereby denuding the churchwardens of any fund whatever for the sustentation of their parish church and their parochial churchyards. It further appears that this appropriation of the Charity Commissioners was confirmed by a judgment of Kay, L.J., then Kay, J., *Re The Parish of St. Nicholas Acons* (60 L. T. 532).

It is certainly to be regretted that the City of London Parochial Charity Act, 1883, should have been so worded as to enable such an inequitable division of this property to be effected.

For the purposes of the present order, it appears, that the rector has always received all interment fees arising from the parochial churchyards. The church, being consecrated ground, is under the exclusive control of this Court, and cannot be interfered with without its sanction. As the rector consents to the sum of 20*l*. a year being paid as a contribution by the company to a church fund for keeping up the church and adjoining churchyard, the Court will by the faculty sanction such payment. But it should be understood that the title to the payment is dependent on the faculty, and not on any agreement of the company with the rector and churchwardens. The Court decrees the faculties subject to the terms mentioned.

Solicitor for rector and churchwardens of St. Benet Sherehog: *Tippets*.

Solicitors for rector and churchwardens of St. Nicholas Acons: *Phillips, Son, & Vallings*.

C. F. J.

(1) 2 Hagg. Eccl. 424.

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be removed to the parochial burial-grounds of the respective parishes for reinterment in the consecrated portion of such burial-ground. (1)

Solicitors for petitioners in both cases: *Lee, Bolton, & Lee.*

C. F. J.

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(1) The minute of the decree in *In re St. Nicholas Cole Abbey* was, so far as material, as follows:—

"The judge having heretofore heard counsel and witnesses, and having materially deliberated thereon, and being satisfied on the evidence given in the case that it was necessary for the purpose of lighting the district of the City of London, in which the churchyard of St. Nicholas Cole Abbey was situated, that there should be a chamber for the transformation and conversion of electricity constructed in the same churchyard, decreed a faculty to issue to the rector and churchwardens of St. Nicholas Cole Abbey, in conjunction with the City of London Electric Lighting Company, Limited, granting by such faculty to the said company the user for a period not exceeding twenty-one years of a space within the churchyard of the said parish 15 ft. in depth, 23 ft. in length, and 13 ft. 3 in. in width, and authorizing them to excavate the same and construct therein a transforming chamber or vault, with walls and a ventilating shaft, and to place therein the necessary apparatus for the transformation and conversion of electricity, and to carry on within the said vault the process of transforming and converting electricity, subject to the said company paying to the rector and churchwardens the yearly sum of 30*l.* towards the general expenses of Divine service at St. Nicholas Cole Abbey."

C. A.
1892
Dec. 7.

[IN THE COURT OF APPEAL.]

THOMPSON *v.* ROURKE.

Jactitation of Marriage.

In a suit of jactitation of marriage brought by the supposed wife, the jury found that she had at a former period acquiesced in the representations of the respondent that she was his wife:—

Held, affirming the decision of Barnes, J., that upon this finding the petition must be dismissed.

THIS was an appeal by the petitioner from a decision of Gorell Barnes, J. (1), where the facts are fully stated.

Lambert Bond, for the petitioner. To a suit for jactitation there are three defences: denial of the boasting, proof of a marriage, or proof that the complainant had authorized the representations made, which shews that the boasting, though false, was not malicious: *Bodkin* v. *Case*. (2) Here the boasting is indisputable, and a marriage is not proved, so the alleged husband is confined to the third ground of defence. This defence is in substance leave and licence by the petitioner for the respondent to represent her to be his wife. There was such leave and licence some years ago, but it has long been withdrawn, and the jactitation has gone on since its withdrawal. If the boasting goes on after the leave and licence has been withdrawn it must be presumed to be malicious.

[LINDLEY, L.J., referred to *Lord Hawke* v. *Corri*. (3)]

The respondent, who appeared in person, was not called upon.

LINDLEY, L.J. I am of opinion that the appeal must be dismissed. The learned judge put two questions to the jury. The first was whether there had been a legal marriage between the parties. The jury felt a difficulty about this: no marriage certificate was produced, the circumstances of the alleged marriage were very singular, and the jury could not agree. But the learned judge put a second question to the jury, whether the petitioner had acquiesced in the boasting of the respondent that he was her husband, and the jury answered in the affirmative. It is contended that this is not a sufficient defence, and that if a general reputation of the petitioner being the respondent's wife arose from her conduct in living with him, that only amounted to leave and licence to represent himself as her husband, and that the leave and licence could be and had been revoked. I am of opinion that we cannot decide such a case as this on that ground.

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(1) Ante, p. 11.

(2) Milw. Ec. R. 355.

(3) 2 Hagg. Cons. 280.

The case of *Lord Hawke* v. *Corri* (1), decided by Lord Stowell, a judge of the very highest authority, is extremely like the present, except in the fact that there a man was the complainant. The petitioner sued to restrain a woman with whom he had lived, and whom he had represented to be his wife, from saying that she was his wife, and the very point on which the petitioner in the present case relies was raised and relied on. The respondent set up the defence of an actual marriage, but that part of her case broke down. What, then, was to be done? The petition was dismissed on the ground that the petitioner did not come into Court with clean hands. Lord Stowell, after commenting on his conduct, said: "I am not speaking here of the moral merits or demerits of such facts. I am concerned only with their legal quality, and I am bound to say of that, that it certainly deprives him of a right to complain of an injury which, if it exist at all, he has inflicted upon himself, and this, not in a moment of indiscretion, at once lamented and withdrawn, but publicly and privately, in habit, and for years without intermission, and in situations where very powerful calls of both duty and decorum might have been expected to impose a restraint. It is difficult to maintain that she is liable to a charge of malice for following his own authorized precedents, for adopting the character he had conferred upon her, for echoing his own assertions, and conforming to his own course of acting. It seems to be a representation rather insinuated than avowed that the permission was given only during the cohabitation, and that this having ceased the permission is expired. This may be true, but it does not follow that it is any part of the duty of the Ecclesiastical Court to proclaim its extinction. That Court is bound, in

(1) 2 Hagg. Cons. 290, 291.

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Lindley, L.J.

a cause of jactitation, to see that parties do not usurp the characters of husband and wife (characters sacred and indissoluble) to the injury of the complainant; but if there be no usurpation, if the title has been so licensed by the authority and still more by the example of the complainant himself, this Court will leave him to relieve himself by his own exertions from the inconvenience of his own acts." This rests on the principle that a complainant, who has for some time authorized the respondent to make representations such as those afterwards complained of, does not come into Court with clean hands, and cannot have relief.

BOWEN, L.J. A suit of jactitation is a rare proceeding, and, as stated by Lord Stowell in *Lord Hawke* v. *Corri* (1), is in the nature of a criminal suit. It has something in common with proceedings for defamation. A restraining order in such a suit is not ex debito justitiæ, the Court has a judicial discretion, and it imposes on the complainant the condition that he must come with clean hands. It is of great consequence to the public that this condition should be enforced, otherwise parties might play fast and loose with matrimonial reputation. If the petitioner chooses to drop a character in which she has held herself out to the world, she cannot call upon the Court to interfere by way of assisting her to do so.

A. L. SMITH, L.J. I agree, and have nothing to add. The ruling of Gorell Barnes, J., is covered by *Lord Hawke* v. *Corri.* (1)

Appeal dismissed.

Solicitor for appellant: *Charles E. Newnham.*

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(1) 2 Hagg. Cons. 290, 291.

H. C. J.

THE SOTO.

1893
Jan. 31.

Admiralty—Practice—Costs—Taxation—Attendance of Country Solicitor at Trial in London.

The allowance, as between party and party, of the costs of the attendance of the country solicitor at a trial in London, is a matter for the discretion of the taxing-master, and, in Admiralty actions, where the statements of the witnesses have been taken by the country solicitor, and the responsibility for the due collection of the evidence has rested with him, his presence may be necessary for the proper conduct of his client's case, and, if so, the costs of his attendance should be allowed.

Summons (adjourned into Court) to review the taxation of the plaintiffs' costs.

The facts—so far as material on the question of the disallowance of the items for the country solicitor's attendance at the trial in London—were shortly that :—

On April 22, 1892, a collision occurred in the Bristol Channel between the plaintiffs' steamship *Earl of Chester* (which had shortly before left Cardiff, to which port she belonged, and where her owners carried on business), and the defendants' steamship *Soto*, belonging to Barcelona, Spain. The result of the collision was that the plaintiffs' vessel sank, and the defendants' vessel had to be beached, and was subsequently taken to Cardiff.

The owners of the *Earl of Chester*, and her master and crew proceeding for their lost effects, commenced an action of damage by collision against the owners of the *Soto*, to which the latter appeared, and, in due course, delivered a defence and counter-claim.

The solicitors for the plaintiffs had their place of business in Cardiff. The defendants instructed solicitors in London.

The managing clerk of the plaintiffs' solicitors, who had taken the statements of the witnesses at Cardiff, attended, on behalf of the plaintiffs, the trial, which took place in London, on June 14 and 15, before Gorell Barnes, J., assisted by two of the Elder Brethren of the Trinity House, when the Court found that the defendants' steamship *Soto* was alone to blame.

On taxation of costs the assistant registrar, as taxing master, disallowed, inter alia, the costs of the attendance in London of the managing clerk of the plaintiffs' solicitors. (1)

H. Holman, for the plaintiffs, in support of the objection to the taxation of the bill of costs.

A. E. Nelson, for the defendants, the owners of the *Soto*.

The arguments of counsel fully appear from the judgment, and all the cases cited on both sides are mentioned therein.

GORELL BARNES, J. (after stating the nature of the case, proceeded):—The assistant registrar, in his answer to the objections as to the disallowance of the costs of the attendance of the country solicitor, says that it has been, up to the present time, the invariable practice not to allow them. He has, therefore, not exercised any discretion in the matter. It was contended by counsel for the plaintiffs, that the attendance of the plaintiffs' country solicitor was necessary in the interests of his clients, and that the registrar ought to have exercised his discretion in the taxation of these items. On the other hand, it was argued that it has been the rule of practice not to allow them.

As the point is of general importance, I have referred to such authorities as there are, and have made inquiries as to the practice in the different divisions.

The following cases all bear upon the subject: *Bell* v. *Aitkin* (2); *Potter* v. *Rankin* (3); *In re Snell* (4); *In re Foster, Ex parte Dickens* (5); *In re Storer* (6); *Ex parte Snow*. (7)

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(1) The items so disallowed were charges in respect of: "Journey to London on June 13; attending all the witnesses." — "Attending Court on June 14, when the case part heard."— "In Court on the 15th, when the case concluded, and *Soto* held alone to blame for collision."—"Paid railway expenses, cab hire, and hotel expenses. . . . ."

The plaintiffs objected to the disallowance of these charges on the ground, inter alia, that the plaintiffs' vessel was owned in Cardiff, and that, having regard to the nature of the action and the amount involved (the plaintiffs having recovered over 5000*l*.), the plaintiffs were entitled to be represented on the trial by the Cardiff solicitors whom they employed, their London agents not being in a position to do justice to the case on the hearing.

(2) Law Rep. 3 C. P. 320.

(3) Law Rep. 4 C. P. 76.

(4) 5 Ch. D. 815.

(5) 8 Ch. D. 598.

(6) 26 Ch. D. 189.

(7) W. N. (1879) 22.

Bell v. *Aitkin* (1) was a case in which the action was for the infringement of a patent. The cause of action arose at Stockport. The trial took place in London, and lasted several days, and a verdict was ultimately found for the defendants. The defendants' country attorney, who had been concerned in getting up the case, attended at the trial as well as the London attorney. On the taxation of the defendants' costs, the master allowed the costs of the attendance of the London attorney, but not of the country attorney, considering himself bound by a general rule not to allow both, and not, therefore, entering at all into the circumstances of the particular case. Bovill, C.J., said in the course of his judgment: "Cases may arise in which it is necessary that the attorney, who has had the conduct of the case from its commencement, and is acquainted with all the facts, should be present at the trial, and I think that the present was such a case. The master does not appear to have exercised his discretion in the matter, but to have considered himself bound by an inflexible rule, that costs such as those in question shall be disallowed. I think that the rule is not inflexible, and that, in this case, it is right that the master should take the facts into his consideration, and exercise his judgment upon them."

Byles, J., gave judgment to the same effect, and Keating and Montague Smith, JJ., concurred.

That case was referred to in *Potter* v. *Rankin* (2), where there was a rule moved for a review of the taxation, and in that case the Court refused the rule, observing that the circumstances of the case relied upon, namely *Bell* v. *Aitkin* (1), were very peculiar. The Court gave no further judgment upon this particular point, and do not seem to have dissented from the principle which is cited by the judges in the course of those judgments to which I have referred.

The result of these cases appears to me to be, that the allowance for the attendance of the country solicitor at the hearing in London is within the discretion of the taxing officer, and that, although as a general rule no allowance will be made, yet, such an allowance may be made in exceptional cases, where it is necessary that the solicitor who has had the conduct of the

(1) Law Rep. 3 C. P. 320.

(2) Law Rep. 4 C. P. 76.

case from the commencement, and is acquainted with all the facts, should be present at the trial.

That is what I understand to be the practice in the different Divisions of the Court, though perhaps there is some difference in the strictness with which the general rule has been applied, and I am informed that, in the Admiralty Registry, it has, in some rare and very exceptional cases, been relaxed.

The question is, whether it was necessary that the country solicitor in this case should attend the hearing, and it is desirable to consider that question carefully, because, although this case was one of difficulty and magnitude, it did not surpass in these respects many heavy collision cases in this Court, and the present decision will affect a number of Admiralty cases.

The practice of disallowing the costs of the attendance of the country solicitor in an Admiralty suit probably originated under circumstances very different from those existing at the present day. In former times the proctors and advocates alone had the privilege of practising in the High Court of Admiralty. This exclusive right was abolished in 1859 by 22 & 23 Vict. c. 6, and in 1861 by s. 30 of 24 Vict. c. 10, certain restrictions against proctors acting as agents for solicitors were done away with; but there seems little doubt from a perusal of the Admiralty Court Rules of 1859 and 1871, that the mode of conducting the cases continued very much the same as before. The London proctor appears to have been treated as having the real conduct of the case, though his instructions came from an outport solicitor, and the fees allowed and forms of bills of costs found in Williams and Bruce, 1st ed., Appendix, pp. lxx. to lxxviii., and ccvi. to ccxxxiv., are in accordance with this view. Amongst these forms is given, at p. ccx., a list of outport charges, and to this a note is appended as follows: "The outport charges are the charges of the country solicitor. They are frequently small in amount, because it often happens that nearly all the matters in respect of which costs are allowed as costs in the cause are transacted in London by the London agent. The outport charges are usually made out in a separate bill annexed to the bill of costs. In taxing the outport charges, the charges for all matters done in the country, in respect of which, if done in

London, specific charges might be made, are allowed in the usual way. But in addition to these charges a sum is ordinarily allowed under the head of *Agency*. This is intended to remunerate the country solicitor generally for necessary work and labour in respect of matters for which specific charges cannot be made. The sum allowed of course varies greatly according to circumstances." It seems fairly clear that all the work was treated as conducted in the London Registry, though there would be certain matters which were dealt with by the country agent, for an agency charge was allowed.

In the present day, since the establishment of the country registries, many cases are conducted entirely in the local registry until the hearing, and in any such case, when the hearing, as is usual in the Admiralty Division, takes place in London, the country solicitors on either side have the whole management of the case.

In 1870 a registry was established in Liverpool, and I am informed by the Liverpool district registrar that, in cases conducted in that registry, it has been the practice since its foundation to allow the costs of the attendance of the Liverpool solicitors at the hearing in London, where witnesses are examined and depositions have been taken by them. By that I understand where they have themselves taken the real conduct of the proceedings and have had the responsibility of taking the statements of the witnesses.

In cases where the solicitors for both parties practise in London no question arises; but, where one side is represented in London, and the other at an outport, or one is represented at one outport, and the other at another, and the case is conducted in London, the question will arise. In this respect an Admiralty case does not differ from some other actions tried in London. There are, however, certain peculiarities about an Admiralty case which are not applicable to most other actions. The hearing of an Admiralty case usually takes place within a very short time of the occurrence, owing to the rapid despatch necessary in a Court where the witnesses are seafaring men. The statements of the witnesses of a vessel represented at an outport are taken by the solicitor with great accuracy; the witnesses usually arrive in London on the night before the hearing under the arrangements which it is necessary to make for this class of witnesses, and the town agent in such a case may have no opportunity of examining them.

In the conduct in court of a difficult collision case, it is, according to my experience at the bar, most important that the solicitor who is responsible for the case, and the preparation of the evidence, should be present, and that counsel should have his assistance. The presence of the solicitor having the conduct of the case, who has seen the witnesses, is necessary in many instances for their proper examination in this class of case, and sometimes as a check even over the witnesses of his own side, or over the independent witnesses of the other side who have given him statements, and he is often obliged, at a moment's notice, to go into the witness-box to deal with statements made by these witnesses.

There are, therefore, in the Admiralty Court, cases in which, owing to the exigencies of modern business, and to the conditions under which the cases are fought, the presence of the country solicitor may be necessary for the proper conduct of the client's case; and, where such is the case, I am of opinion that the costs of his attendance at the hearing should be allowed.

If this principle is cautiously and properly applied, no improper charge is thrown on the losing side, whereas if it is not applied, and the general rule is adhered to in all cases, a successful suitor may have to bear the cost of the attendance of his own solicitor, though that solicitor's presence was necessary to the successful prosecution of his suit.

In the present case the attendance of the managing clerk of the plaintiffs' Cardiff solicitors appears to me to have been necessary, and I refer the case back to the registrar to review his taxation, and, in doing so, he will have to reconsider the allowance for the attendance of the London agent, because if the country solicitor is allowed for, only such assistance as is necessary for him at the hearing can be allowed.

Objection to taxation upheld with costs.

Solicitors for plaintiffs: *Downing, Holman, & Co., for Downing, & Handcock, Cardiff.*

Solicitors for defendants: *Lowless & Co.*

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THE EDENMORE.

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Jan. 16.

Admiralty—Salvage—Agreement to Tow—Extra Premium paid for Deviation—Effect on Amount and Apportionment of Award.

A large steamer valued, with cargo and freight, at between 134,600*l.* and 155,170*l.*, fell in with a disabled steamer in the Atlantic valued, with cargo and freight, at 90,000*l.*, and, in five and a half days, successfully towed her to Halifax, a distance of 340 miles.

Before the towage commenced the following agreement was signed: "It is this day mutually agreed between (the masters of the two vessels) that the (disabled steamer) shall be towed into port, if possible, by the (salving steamer), and whatever services are rendered, and loss of time, shall be settled between (the respective owners)."

By reason of the salvage services, the owners of the salving vessel (amongst other expenses), paid the sum of 342*l.* extra premium to their underwriters to waive the breach of warranty against British North American ports at that season of the year.

In making an award to the owners, master and crew of the salving vessel, of 5350*l.*, and apportioning 4225*l.* to the owners, the Court:—

Held, that as the agreement might be construed to entitle the salvors to some remuneration even if their services were unsuccessful, it must be taken into account as an element reducing the award; on the other hand, the extra premium paid for deviating to Halifax must be considered as an element increasing the proportion of the award to which the owners were entitled.

ACTION of salvage.

The plaintiffs were the owners, master, and crew of the steamship *Inchmarlo*; the defendants were the owners of the steamship *Edenmore*, her cargo, and freight.

The facts, so far as material, were briefly as follows:—

About 6.30 A.M. on November 4, 1892, those on board the *Inchmarlo*—a steel screw steamship of 1924 tons net and 2967 tons gross register, with triple expansion engines of 300 horse-power nominal, working up to 1800 actual, with a crew of thirty-one hands, and a cargo of cotton from Savannah to Liverpool—observed, two points on the starboard bow, and two to three miles distant, a vessel exhibiting three black balls shewing that she was not under command. The weather at the time was cloudy with a fresh breeze from the W.S.W. and a high following sea. *The Inchmarlo* proceeded towards her, and on approaching she was seen to be flying the code signal N.C., meaning "In distress

—want assistance," and with the ensign in the main rigging, union down.

The vessel proved to be the iron screw steamship *Edenmore* of 1564 tons net and 2459 tons gross register, with engines of 250 horse-power nominal, and a crew of twenty-seven hands, with a cargo of cotton and oil-cake from Galveston to Liverpool. On October 29 her propeller tail shaft had broken in the stern-pipe close to the stern-post, and had smashed the stern-tube, so that repairs could not be effected, the result being that the vessel had, during seven days, helplessly drifted some forty to fifty miles to the N.E. and had met with no vessel except on November 2, when a steamer was seen bound westward, but she took no notice of the signals for assistance.

The master of the *Edenmore* lowered his lifeboat and went on board the *Inchmarlo* and requested the master of that vessel to tow him if possible to Halifax, Nova Scotia, which the master of the *Inchmarlo* promised, if he could, to do. The following agreement was then signed: "At sea, November 4, 1892. About lat. 41 N., long. 58.20 W. It is this day mutually agreed between W. T. Ashby, master SS. *Inchmarlo* and myself, C. A. Watson, that the SS. *Edenmore* shall be towed into port if possible by the SS. *Inchmarlo*, and whatever services are rendered, and loss of time, shall be settled between my owners and the owners of the SS. *Inchmarlo*, C. A. Watson, master SS. *Edenmore*, W. Thos. Ashby, master SS. *Inchmarlo* of Liverpool. Witness, A. Richardson, engineer."

The master of the *Edenmore* having returned to his vessel, the *Inchmarlo* was manœuvred so as to pick up a cask with small line floated from the *Edenmore*, and two wire hawsers were passed between the vessels; but one broke, and, owing to the heavy sea running, it was not until 7 P.M. after the vessels had been drifting to the southward and eastward at the rate of some three knots an hour, that the ropes were all fast when the *Inchmarlo* proceeded to tow slow ahead in the direction of N.W. b. N. Throughout the night the wind blew strong from the S.W. with heavy squalls and high cross seas, causing both ships to roll heavily, and rendering the towage so difficult that not more than a speed of from two to three knots could be kept up. On

November 5 the course was altered to N.W., and the towage was cautiously continued, the weather being bad, with squalls from the S.W. and a high sea. On November 6, as the wind increased to a gale, the speed had to be reduced to dead slow, and during the day the wind shifted through N. to N.N.E., obliging the vessels to be kept to the westward so that not more than thirty miles was made in the two days. On November 7, as the weather improved the speed was increased on a N.W. b. W. course. On November 8, the wind became squally and gusty and the engines had to be reduced to half speed. On November 9, at 8.30 P.M., Chibucto Light was sighted, and at 11.40 a pilot was taken on board; but at 2 A.M. on November 10 the port tow-rope parted, and both vessels had to anchor. At 3.30 A.M. towing recommenced. At 5 A.M. the quarantine ground was reached, and by 9 A.M. the *Edenmore* was safely anchored in Halifax Harbour, after a towage of 340 miles, lasting five and a half days.

The *Inchmarlo* then took in coal; but owing to the severity of the weather this could not be completed until the following evening, when she proceeded on her voyage, arriving at Liverpool on November 23, having lost about nine days through the performance of the salvage service.

The policies of insurance on ship gave liberty "to tow and assist vessels . . . in all situations, and . . . to render salvage services," but the owners of the *Inchmarlo* claimed as expenses 342*l.* additional premiums paid by them to their underwriters to waive the breach of the warranty against any port in British North America after October 1 (1), including 10 per cent. premium in respect of the insurance on freight from Savannah to Liverpool in consequence of the deviation. Other items of expense which were also claimed by the plaintiffs, as elements

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(1) The terms of the warranty slightly varied in different policies, but in that of the Sea Insurance Company it ran:—

"Warranted not to be in . . . . British North America between October 1 and April 1." A marginal note in the various policies was to the effect that:—

"Held covered in the event of any *breach of warranty* herein expressed as to voyage or cargo, if without the knowledge or beyond the control of the assured, provided advice be given, and any additional premium arranged, as soon as assured become aware of breach of warranty."

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to be considered in fixing the award, are sufficiently referred to in the judgment.

The values were as follows: the salved vessel *Edenmore*, 20,000*l.*; cargo, 64,636*l.*; freight at risk, 5364*l.*; total, 90,000*l.*; the salving vessel *Inchmarlo*, 35,000*l.*; cargo at Halifax, 95,000*l.*; (at Liverpool, 115,570*l.*); freight, 4660*l.*; total, 134,600*l.*; or, if value of cargo reckoned (according to plaintiffs' contention), at Liverpool, 155,170*l.*

Aspinall, Q.C., and *Butler Aspinall*, for the plaintiffs, the owners, master and crew of the *Inchmarlo.*

Sir Walter Phillimore, and *A. D. Bateson*, for the defendants, the owners of the *Edenmore.* The arguments of counsel sufficiently appear from the judgment. On the question of the effect of the agreement, the following cases were cited: *The Benlarig* (1); *The Alfred* (2); *The Kate B. Jones.* (3)

GORELL BARNES, J. [After referring to the size and great value of both the vessels, and detailing the salvage services, continued]:—The principal matter to consider in this case is the risk to which the *Edenmore*, her cargo and freight, were exposed. The view I take, and which accords with that of the Trinity Masters, is that her position was one of a very serious nature. She had been knocking about for seven days without being able to obtain assistance, and, from her helpless condition, her only salvation lay in the assistance of a steamer powerful enough to tow her safely into port. Without that assistance, this large steamer, with her valuable cargo and freight, would in all probability have never been heard of again.

It is suggested by counsel for the defendants, that if you had only given the *Edenmore* time she would have drifted across and been found in the chops of the Channel. Well, it would require, I believe, if she drifted steadily at the rate of three knots an hour, some two months to accomplish such a remarkable feat; and what would have happened in the meantime, assuming that her provisions had held out? She would have had to encounter the violent weather of the months of November

(1) 14 P. D. 3.

(2) 5 Asp. M. L. C. 214.

(3) [1892] P. 366.

and December last. Such a suggestion contains its own answer, because it really means that this vessel must have had in order to successfully relieve her from her disastrous fate, a towage power able to perform a rescue such as was necessary.

Another element is the risk to the *Inchmarlo*. With regard to that, again, counsel for the defendants have suggested that the contract, made at sea, between the two masters on November 4, would minimise the risk of loss to the salvors in case they performed services, but did not actually perform useful services. [The learned judge read the agreement already set out, and continued :—]

I have considered that document with some care, and I incline to the view that it is possible that the proper construction of it would entitle the salvors to some remuneration, even if their services were not successful. In dealing with the amount of the award in this case, I have borne that in mind, though I must say in a case of this character it is very difficult to say what precise amount of effect it is to have on the reduction of the amount of the award where the services have turned out to be successful. But it does not minimise the danger to the salvors, because they run their risk whether they get paid for their services, or whether they get remunerated by salvage, and although no very special risk has been proved to the salvors in this case, except the one suggestion of a possible collision in making fast, it must not be forgotten that these large vessels always run some risk in making fast and in the performance of services of this character—risk sometimes of collision and sometimes of straining in the performance of the towage. Then there is another element, namely, the weather which was encountered. There is no doubt, I think, that the weather was for part of the time extremely severe. [The learned judge referred to the state of the weather, already detailed, and continued :—]

For the latter part of the time it was not apparently so severe, though there was some difficulty in getting into Halifax. It is said that the danger cannot have been so great, because the towage was not performed with any parting of the hawsers. I am not quite satisfied, nor are the Trinity Masters, that that is quite the right view to take. They think, and I agree, that it shews very considerable skill in handling the salving vessel that, in face of weather such as there was, the salvors should have been able to perform the services they did without parting and without accident.

The salvors suggest that they have been put to certain expenses in consequence of the towage—port expenses, some repairs, docking, and hawsers. Also that a premium of 342*l.* must be taken into account in considering the expenditure incurred by the owners, as they had to pay this sum to the underwriters of their ship to waive the breach of warranty resulting from the deviation, there being a stipulation in the policies on the ship prohibiting the vessel from going to certain ports of British North America, including Halifax, at that season of the year. What their position with regard to their cargo owners would have been has not been put before me.

One element of consideration brought to our attention was that the vessel was chartered or agreed to be engaged on terms which would have enabled her to make a profitable voyage to cotton ports and back again, whereas she had to be laid up, her charter being cancelled, and that she made not only no profit, but also made a loss of some 60*l.* a month. That figure does not come to very much. It is said to be a fact that she would have made 330*l.* in the course of the next three months or so, which she lost.

These are not items which are strictly recoverable in the form of actually giving them to the salvors. They form elements for consideration, and the great difficulty in a case of this kind is to give a proper award on a due consideration of all the elements which go to make it up. The great point, to my mind, is the safety of this large steamer and her valuable cargo, amounting in all to a sum of 90,000*l.*, and, after giving due weight to the arguments which are properly entitled to be borne in mind in this case, I think the sum of 5350*l.* is the proper award to make.

Bearing in mind that the expenditure of the owners, to which I have referred, is to be taken into account, because the amount they will receive under the apportionment will not be all money into their pocket, as something will come off it for the expenditure which they have had to make, I apportion the sum in the following way: to the owners 4225*l.*; to the captain 375*l.*; and to the crew 750*l.*

Solicitors for plaintiffs: *Hill, Dickinson, Dickinson, & Hill, Liverpool.*

Solicitors for defendants: *Bateson, Warr, & Bateson, Liverpool.*

T. L. M.

1893
Jan. 28, 31.

WHITWORTH *v.* WHITWORTH AND THOMASSON.

Divorce—Bigamous Marriage of Petitioner—Ignorance of Law—Discretion— 20 *&* 21 *Vict. c.* 85, *s.* 31.

A husband and wife separated and signed an agreement by which each of them agreed that the other should be at liberty to marry again. The husband, believing that his marriage was legally dissolved, went through the ceremony of marriage with another woman, and cohabited with her; but, being advised that the agreement which he had signed was worthless, he left her, and resumed cohabitation with his wife, who was afterwards guilty of adultery with the co-respondent. The husband then presented a petition for divorce on the ground of his wife's adultery:—

Held, that, as the petitioner acted as he did in the bonâ fide belief that the agreement which he had signed constituted a legal dissolution of the marriage, the Court was justified in the exercise of its discretion in granting him a divorce.

EDMUND WHITWORTH petitioned for a dissolution of his marriage with Elizabeth Whitworth on the ground of her adultery with James Thomasson.

The case was heard before Gorell Barnes, J., without a jury.

Priestley, for the petitioner.

Barnard, for the co-respondent.

The respondent did not appear.

It appeared from the evidence of the witnesses called at the hearing that the parties were married on April 30, 1872, at Spotwood, in the county of Lancaster, and cohabited at Rochdale and other places up to the year 1882. There were five children of the marriage. The petitioner became addicted to drink, and the respondent, after leaving him twice for short periods, finally separated from him altogether in 1882, after he had been drinking for a week, and went to live with a man named Clegg. The

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petitioner had some idea of applying for a divorce; but he consulted a friend, who told him it would be foolish to spend money on a divorce, as he and his wife could sign a paper giving each other leave to marry again. To his inquiry whether this would be legal, his friend replied: "I and my wife have done it, and I have heard no complaints; and, if you like, my brother, who drew up the paper for us, will draw up a similar one for you." The result was that a paper was drawn up, which was not forthcoming, but the substance of which was to the effect that the petitioner and his wife agreed to separate, and that each should be at liberty to marry again; and, the respondent being quite willing, it was signed by both of them. After that the petitioner lived for eighteen months as a single man; he then went to Halifax, where he met a Miss Naylor, to whom he proposed marriage, informing her at the time of the manner in which he had separated from his wife. He told her that he was a married man, but that he and his wife had signed a paper which he believed made it quite legal for him to marry again. In August, 1886, he went through a ceremony of marriage with Miss Naylor, and lived with her for three years, when a teacher in the Sunday school with which he was connected advised him to consult a solicitor in regard to his position, and he then learned for the first time that his first marriage was still valid, and that his second marriage was not legal. Upon this he and Miss Naylor at once seqarated, and he went back to the respondent, who cohabited with him for three months, but then left him and went back to Clegg. He died shortly after, and on November 5, 1891, she married the co-respondent.

The petitioner then commenced this suit, and in his evidence at the hearing he swore that he believed at the time that the document signed by himself and the respondent entitled them both to marry again. The co-respondent was also examined, and stated that when he went through the ceremony of marriage with the respondent he knew that she had been cohabiting with Clegg; but he understood that she had been married to the petitioner, and that he was dead.

Priestley, for the petitioner, submitted that if he went through

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the ceremony of marriage with Miss Naylor in the bonâ fide belief that the agreement gave him liberty to marry again, his adultery would under the circumstances be no bar to a divorce. [He cited *Collins* v. *Collins* (1), *Conradi* v. *Conradi* (2), *Ross* v. *Ross* (3), *Stoker* v. *Stoker* (4), and *McCord* v. *McCord.* (5)]

Barnard, for the co-respondent.

Cur. adv. vult.

GORELL BARNES, J., in giving judgment, after reviewing the facts, said:—The principle on which the Court acts in these cases is laid down distinctly in a number of cases, of which the most recent are *Noble* v. *Noble* (6), and a case decided by myself, *Moore* v. *Moore.* (7) These were cases which arose on the fact that the remarriage had occurred after the decree nisi, and before it was made absolute. Other cases were cited, particularly *Morgan* v. *Morgan and Porter* (8), in which the Court held that there must be some special circumstances attending the commission of the adultery, or special features placing it in some category capable of distinct statement and recognition, to justify the Court in exercising its discretion in favour of the petitioner. If one looks at the cases in which the Court has exercised its discretion to excuse adultery committed by a petitioner, it is clear that they all possess some special feature capable of statement or recognition. The three classes of cases in which the Court has exercised the discretion given to it under s. 31 of the Divorce Act of 1857 are well known, and they are stated by the Court in the judgment in *Morgan* v. *Morgan and Porter.* (8) The first is ignorance of the fact, such as the case of *Joseph* v. *Joseph and Wentzell* (9), where a man married again, believing his wife to be dead. There is also ignorance of the law, as in *Noble* v. *Noble* (6) and *Moore* v. *Moore* (7), where the petitioner married again before the decree nisi was made absolute, under the impression that the marriage was dissolved. Mr. Priestley argued that this case comes within the second

(1) 9 P. D. 231.
(2) Law Rep. 1 P. & D. 514.
(3) Law Rep. 1 P. & D. 734.
(4) 14 P. D. 60.
(5) Law Rep. 3 P. & D. 237.
(6) Law Rep. 1 P. & D. 691.
(7) [1892] P. 382.
(8) Law Rep. 1 P. & D. 644.
(9) 34 L. J. (P. & M.) 96.

category, and that it is one of those cases in which the Court has considered that the petitioner entered into a second marriage in ignorance of the law and in a bonâ fide belief that the first marriage was dissolved. In giving judgment in *Noble* v. *Noble* (1), the Judge Ordinary said: "Looking at the manner in which the marriage was contracted, I am prepared to give credence to his statement that he believed he had been released by law from his previous wife, and on that account he contracted the second marriage and committed adultery. It has been said that ignorance of the law is no excuse. But when the Court has a discretion, the petitioner's ignorance of the law may be properly excused. Now the statute says that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery; in other words, it gave the Court a discretion." The substantial question, therefore, in this case is, whether I am prepared to give credence to the statement of the petitioner, that he believed himself to be released by law from his wife, and therefore at liberty to contract another marriage. It certainly struck me that there was some difficulty in believing that the petitioner ever honestly thought that what he had done released him from his marriage, so as to entitle him to contract a second marriage. I waited with some anxiety to see what class of man he was, and whether he would strike me as an honest man; and, after hearing his evidence, I have come to the conclusion that he honestly believed his first marriage to be legally dissolved. And my reasons for that are these. He was a man in a humble rank of life; he knew nothing about law—according to his own counsel, he was a stupid man, he was entirely unable to understand his legal position, and he allowed himself to be misled. A proof of that is, that he entered into the second marriage by banns; that he explained the state of the case to his second wife; that as soon as he discovered the second marriage to be illegal he separated from her, and returned to his first wife. It was only in casual conversation that he learned his error—if his wife had not left him again, they would have been living together now; and as soon as she left him he applied to the Court for relief. I do not think I should be justified

(1) Law Rep. 1 P. & D. 691.

in coming to the conclusion that he was deceiving the Court; and the conclusion to which I have come is that he acted bonâ fide in what he did, and that his case comes within the second category of cases which have been mentioned—that of persons who have acted in ignorance of the law. There will, therefore, be a decree nisi, but with no costs against the co-respondent.

Solicitors for petitioner: *Torr, Janeway, Gribble, & Oddie.*
Solicitor for co-respondent: *Douglas Norman & Co.*

W. L.

GREEN *v.* GREEN AND SEDGWICK.

1893
Jan. 25, 31.

Divorce—Foreign Law—Domicil—English Marriage—American Divorce.

In a petition by a husband for dissolution of marriage on the ground of the adultery of his wife, it appeared that the petitioner was a British subject, resident and carrying on business in London, and the respondent was an American, domiciled in the State of Pennsylvania. They were married in London, and cohabited there for some months, when the respondent went to Philadelphia partly, as she alleged, to visit her mother who was ill, and partly to be present at the marriage of her sister. She never returned to her husband, and after repeated attempts to induce him to consent to an amicable separation, she commenced a suit for divorce in the Court of Common Pleas at Philadelphia, on the ground of cruelty. By the statute law of Pennsylvania, the Courts of the State had jurisdiction over all matrimonial causes, where it could be shewn by any wife that she was formerly a citizen of the commonwealth, and that having intermarried with a citizen of any other State, she had been forced to abandon the domicil of her husband by reason of his cruelty or adultery, and had been domiciled within the jurisdiction for a whole year before the commencement of the suit. The petitioner was personally served with notice of this suit, but did not appear, and the Court of Philadelphia pronounced a decree of divorce. The respondent immediately afterwards married the co-respondent, and they subsequently lived together as man and wife in the United States:—

Held, that the case of the petitioner had been proved, and that he was entitled to the decree claimed by his petition, for the Court of Philadelphia had no jurisdiction to pronounce a decree dissolving the marriage of a British subject domiciled in this country, who had never submitted himself to its jurisdiction.

THIS was a petition by the husband, praying for a dissolution of the marriage, on the ground of his wife's adultery.

The case was heard before Gorell Barnes, J., without a jury.

Inderwick, Q.C. (*Pritchard*, with him), for the petitioner.

The respondent and the co-respondent did not appear.

From the evidence given at the hearing, it appeared that Mr. James Green, who is a merchant carrying on business in London, born in England, and always resident in this country, made the acquaintance of the respondent, who was born in the United States of America, on board a steamer in 1889, when he was returning from the United States, where he had gone in order to be present at the marriage of his son. The respondent was at that time a widow, known as Mrs. Ida G. Woodruff, and was coming to this country on a visit to friends. The petitioner and the respondent saw much of each other in London, and on January 20, 1890, they were married at St. Mary Abbot's Church, Kensington. The petitioner made a settlement of 1200*l.* a year on his wife as long as they continued to live together, and he also made a provision for her in the event of her surviving him. They cohabited in London until April 23, 1890, when the respondent went to the United States, partly, as she alleged, to visit her mother who was in bad health, and partly to be present at the marriage of her sister, who at that time was staying with her in London. The petitioner and his wife parted on friendly terms, and she arranged that she would return in June. She never did return, although the petitioner frequently wrote requesting her to come back. In June of that year, she sent over an agent, Mr. Noyes, to this country, who brought a letter to the petitioner from her, in which she said of him, "He is fully advised of my wishes, and I trust his conference with you may result in an arrangement for our mutual interests and happiness." In the same letter she said, "As you are aware, the immediate cause of my leaving England was the illness of my mother and the approaching marriage of my sister," and she went on to say that in not returning she was acting on the advice of her physician, in view of the extreme nervous prostration from which she suffered while in London. Mr. Noyes, her agent, had several interviews with the petitioner, and endeavoured to arrange matters, as he said, so that she could get a divorce, as she was tired of the restriction and wanted to get rid of it; but the petitioner refused to enter into any such arrangement.

On July 7, 1891, after many communications, the petitioner was served with a citation issuing out of the Court of Common Pleas at Philadelphia in a suit for divorce, commenced by the respondent on the ground of cruelty. In the pleadings the respondent set out that her husband was a domiciled Englishman, and that she herself was an American citizen—that she was married in England, but that she had been compelled by her husband's conduct to return to the United States, and she claimed that, having been resident within the jurisdiction of the Court for twelve months previous to the bringing of the suit, within the meaning of the statutes of Pennsylvania, she had recovered her American domicil, and was entitled to relief in the American Court. It appeared that on June 9, 1891, the Pennsylvania Legislature had passed an Act which was described as a supplement to the Act of 1855, and which extended the jurisdiction of the Court to all cases of divorce from bonds matrimonial, and from bed and board, when it should be shewn in the petition to the Court by any wife that she was formerly a citizen of the commonwealth, and that having intermarried with a citizen of any other State or foreign country, she had been compelled to abandon the habitation or domicil of her husband by reason of his adultery, barbarous treatment, or desertion.

The petitioner, acting under advice, did not appear, and on July 2, 1892, a decree was pronounced in the Court of Philadelphia dissolving the marriage between the petitioner and respondent on the ground of cruelty.

On August 11, 1892, the respondent and co-respondent went through a ceremony of marriage at Philadelphia, and had since cohabited together as man and wife. On August 19 the petitioner filed the present petition praying for a divorce.

Inderwick, Q.C., referred to *Lolley's Case* (1); *Tollemache* v. *Tollemache* (2); *Palmer* v. *Palmer* (3); *Harvey* v. *Farnie*. (4)

GORELL BARNES, J., in giving judgment, after reviewing the facts, said:—The evidence in this case satisfies me that the charges made against the petitioner in the American Court

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(1) Russ. & Ry. 237.
(2) 1 Sw. & Tr. 557.
(3) 1 Sw. & Tr. 551.
(4) 8 App. Cas. 43.

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Gorell Barnes, J.

were unfounded, and that the American decree was really unjustly pronounced. But as it stands, the curious result is this—that the marriage in America is legal, while the English marriage is still legally binding in this country. I have looked into the cases to which I have been referred from the time of *Lolley's Case* (1) down to *Tollemache* v. *Tollemache* (2) and *Harvey* v. *Farnie* (3), and I find that there is no case in which it has ever been decided that a man can be divorced from his wife by the laws of a country in which he has never been resident or domiciled. The petitioner here has always been a domiciled Englishman, and his wife, though an American by domicil of origin, upon her marriage with the petitioner became a domiciled Englishwoman. It appears to me that she left him of her own accord, and without any cause whatever. In my opinion the American decree was unjustly obtained against the petitioner, who never submitted himself to the jurisdiction of the American Court, and it was obtained on grounds which would not have entitled the parties to a decree in this Court. There is no case precisely in point; but on the principle laid down in *Shaw* v. *Attorney General* (4), it is clear that though the decree of divorce may be treated as valid in America, this Court cannot recognise it as putting an end to a marriage which is binding in this country—the petitioner being domiciled in England. I therefore think that the petitioner was rightly advised in not submitting himself to the jurisdiction of the American Court, and that he is entitled to claim a dissolution of his marriage with the respondent on the ground of her marriage with the co-respondent. I therefore pronounce a decree nisi.

Solicitors: *Pritchard & Sons.*

(1) Russ. & Ry. 237.

(2) 1 Sw. & Tr. 557.

(3) 8 App. Cas. 43.

(4) Law Rep. 2 P. & D. 156.

W. L.

MIDWINTER *v.* MIDWINTER.

1893 *Feb. 7.*

Divorce—Settlement of Wife's Property—Provision for Husband and Children—Amount of Allowance fixed or variable—Dum solus Clause—Provision for Children not limited to the Age of Sixteen—The Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 35, 45.

On a petition for the settlement of the property of a wife found guilty of adultery, for the benefit of her husband and the children of the marriage, it appeared that the wife's income amounted to 1140*l.* a year, consisting chiefly of a life interest in leasehold property under the will of her father; and the husband's income was 350*l.*, derived from his business. The Court ordered the wife to settle 250*l.* for life on her husband, and 60*l.* a year on each child, and refused to make the allowance to the husband variable according to the possible fluctuation in the value of the wife's property, or to limit it to such time as he should remain unmarried, or to order that the allowance to the children should cease at the age of sixteen.

Motion to confirm the registrar's report on a petition for a settlement of the wife's property, presented by a husband who had obtained a decree nisi dissolving the marriage on the ground of her adultery.

The decree nisi was pronounced on June 19, 1890, and on December 15, before the decree nisi was made absolute, the petitioner presented a petition for settlement of the wife's property. The registrar made a report, and on this report the petitioner made a motion before Jeune, J., that his wife be ordered to settle 700*l.* a year for the benefit of the petitioner, and after his death for the benefit of the children of the marriage; but Jeune, J., on July 24, 1891, dismissed the application on the ground that, as no evidence had been given that the respondent intended to defeat the order of the Court, there was no reason for departing from the ordinary practice of making an order on the petition after the final decree had been pronounced. The Court of Appeal (1) reversed this decision, and ordered the matter to be referred back to the registrar to inquire and report as to what property the respondent was entitled to in possession or reversion, and what order for settlement (if any) should in his opinion be made.

The registrar reported that the petitioner had an income of

(1) [1892] P. 28.

350*l.* a year from his business as a furniture dealer, and that the respondent had a life interest under the will of her father in certain leasehold houses producing an income of about 1100*l.*, and was also entitled by a post-nuptial settlement to an income of 40*l.* a year arising from the investment of accumulations under her father's will. The trusts, both of the will and the post-nuptial settlement, gave the respondent a life interest without power of anticipation. The report recommended that the respondent be ordered to settle and assign to trustees an annuity of 550*l.* during her life, of which 250*l.* should be for the benefit of the petitioner, and 60*l.* for the benefit of each of the five children of the marriage, of whom the petitioner had custody —the sixth child being an infant at the time of the decree nisi, and left in the custody of the respondent.

Inderwick, Q.C. (*Priestley*, with him), moved, on behalf of the petitioner, that the registrar's report be confirmed.

Searle, for the respondent. Whatever order the Court may make, some provision should first be made for the payment of debts already incurred by the wife. In *Wigney* v. *Wigney* (1) the Court held that this ought to be done before the wife was deprived of a large part of the income on the faith of which she had contracted such debts. It may be doubted whether the Court has power to make any order dealing with property not in settlement, but under the will of the respondent's father subject to restraint on anticipation.

[THE PRESIDENT. The Court of Appeal (2) have decided that I have jurisdiction.]

The amount recommended by the registrar is a fixed sum; but as the respondent's income is derived from leasehold property, which may become less valuable with lapse of time, there ought to be a corresponding abatement in the amount settled by the Court. The father's estate is being administered in Chancery, and a yearly account has to be given, so that no final order need be made. It has been held in *Blandford* v. *Blandford* (3) that the Court has no power to order maintenance for children beyond

(1) 7 P. D. 177, 228.

(2) [1892] P. 28.

(3) [1892] P. 148.

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the age of sixteen. The application there was made under s. 35 of the 20 & 21 Vict. c. 85, whereas this motion is made under s. 45; but the principle is the same.

[THE PRESIDENT. Has s. 35 ever been applied to the case of a guilty wife?]

If the same principle were not applied, there would be the anomaly that a guilty husband would only be bound to support the children of the marriage up to the age of sixteen, while the property of a guilty wife would be liable for the maintenance of her children during her whole life. In any view, the settlement on the husband should be limited to such time as he shall remain unmarried.

Inderwick, Q.C., in reply. In regard to the provision to be made for the petitioner, the registrar took into consideration the contingency that the wife's income might decrease, and was of opinion that it could not possibly increase, and that the husband's income, being derived from business, might also fluctuate. In *Benyon* v. *Benyon and O'Callaghan* (1) the Court refused to diminish the sum ordered to be settled by the wife on the ground that the wife's investments had fallen in value. *Blandford* v. *Blandford* (2) was based on *Webster* v. *Webster* (3); but that had been misapprehended, and on the case being investigated at the registry, it was found that the original order for maintenance was made in August, 1869, and that the wife had two daughters living with her, that when one daughter married at the age of eighteen her allowance of 50*l.* was reduced to 25*l.* a year, and that when the other daughter came of age in December, 1879, a summons was taken out to shew cause why the order for maintenance should not be discharged; but the President refused to make any such order, and the payments went on. [He cited *Bacon* v. *Bacon* (4), *Seatel* v. *Seatel* (5), and *March* v. *March and Palumbo.* (6)]

THE PRESIDENT. I can decide all the points which arise in this case except that relating to the debts, as to which it is

(1) 15 P. D. 29, 54.
(2) [1892] P. 148.
(3) 31 L. J. (P. & M.) 184.
(4) 2 Sw. & Tr. 86.
(5) 4 Sw. & Tr. 230; 30 L. J. (P. & M.) 216.
(6) Law Rep. 1 P. & D. 440.

said that a provision should be made for paying them, or that some allowance should be given to the wife for the benefit of the creditors. I pass that by now, because I have hardly sufficient information before me to enable me to deal with it.

The income of the wife seems to be somewhere about 1140*l.*, and the income of the husband 350*l.* The wife's chief income is derived under the terms of her father's will, which left her the property subject to restraint on anticipation. The recommendation of the registrar is that she should settle 250*l.* for the benefit of the husband, 60*l.* for each of the five children, who are in his custody, making a total of 550*l.*, or, roughly speaking, half her income.

The first question which arises is, whether I ought to give a fixed sum, or whether the sum ought to be variable—that is to say, whether some provision ought not to be made for meeting the contingency of the wife's property falling in value. I do not think the matter can be dealt with in the way of leaving the sum open for future increase. Property of this kind no doubt may vary in value, because the costs of repairs may increase; while on the other hand the houses may go up in letting value in that neighbourhood before the leases expire. I confess I was tempted to try to make such an order as that the wife should retain certain property to which the income of the husband should always bear a certain proportion, which of course would meet the exigencies of variation. But there are objections to that, and one of the main objections is that it has never been done so far as I am aware. Moreover, as Mr. Inderwick pointed out, the husband's income, as it is derived from business, is also variable, and on the whole I will not depart from the usual practice of naming a fixed amount.

There is nothing in the conduct of the parties to influence me much. It is said that the husband eloped with his wife, and that that is a reason why he should not have any great benefit from her money. On the other hand, it seems that she has recognised 500*l.* as being the proper amount to fix for his share in her income.

I pass over the suggestion that a clause might be inserted in the settlement limiting the husband's receipt of his income to the time of his remaining unmarried; because I think the principle of a dum sola clause is inapplicable to the case of a husband.

The most serious question, however, in the case is as to the children. The proposal is, that the money should be settled on them for the whole of their lives, and the question is raised whether it ought not to be limited to the age of sixteen instead of being given to them absolutely. It has been suggested that since the case of *Blandford* v. *Blandford* (1), which was decided on the 35th section of the Matrimonial Causes Act of 1857, the principle acted upon ought to be that a child should not take a benefit after the age of sixteen. It is pointed out that, assuming *Blandford* v. *Blandford* (1) to be good law, the effect of it is that a guilty husband is not bound to support his children after the age of sixteen, but that a guilty wife is liable to have her property charged for the whole of her children's lives. That argument appears to me to be a sound one, and, taking that view of the matter, there would seem to be an anomaly. I must, however, assume *Blandford* v. *Blandford* (1) to be good law, and I must assume that under s. 35 of the Matrimonial Causes Act of 1857 no order can be made for children after the age of sixteen. But when one looks at the two sections—35 and 45—of the Act, whatever interpretation must be put on s. 35, it by no means follows that a similar interpretation should be put on s. 45. *Blandford* v. *Blandford* (1) proceeds on this principle, that the husband's liabilities for the custody, maintenance, and education of children are of the same nature, and that, inasmuch as the common law liabilities for custody and education stop at the age of sixteen, the Court ought not to recognise a more extended liability in regard to maintenance. Sect. 45 stands on a different footing. It cannot be argued that you are to be guided by common law liability, because the wife has no common law liability, nor is there anything in the language of s. 45 to give rise to the inference drawn from the collocation of words in s. 35. It seems to me that property may be dealt with under s. 45 for the benefit of the husband for the whole of his life, and it follows that it may

(1) [1892] P. 148.

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be dealt with for the benefit of the children for the whole of their lives. There is no reason why it should not be so. There is, further, distinct authority in *Bacon* v. *Bacon* (1), because in that case there was property under a will, and a permanent settlement was made for the benefit of the husband and children, exactly as is asked here. I do not see any difference in this respect between dealing with the property of a wife to which she is entitled in possession or reversion, and dealing with property which is in settlement. The words in s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), are similar to the words in s. 45 of the 20 & 21 Vict. c. 85.

Then comes the question of the amount, and although every case must stand on its own merits, the cases of *March* v. *March and Palumbo* (2) and *Bacon* v. *Bacon* (1) seem to me to warrant the decision to which the registrar has come. In this case there are five children, and in *March* v. *March and Palumbo* (2) there was only one. I see no reason, therefore, for differing from the view taken by the registrar, that the husband should have 250*l.* a year, and the children 60*l.* each for the whole of their lives. The figures I have given go of course on the assumption that no allowance is made to the wife for the payment of debts, and with regard to them, until I know how they were incurred, what is their nature, and their exact amount, I cannot make any allowance. I shall therefore refer it back to the registrar to inquire into these particulars and to report to me, that I may hereafter consider whether I shall make any allowance to the wife on that account.

Solicitor for petitioner: *W. W. Palmer.*
Solicitors for respondent: *Webster & Webster.*

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(1) 2 Sw. & Tr. 86.

(2) Law Rep. 1 P. & D. 440.

W. L.

GOOCH *v.* GOOCH.

1893
Feb. 11, 15.

Judicial Separation—Deed of Separation—Covenant not to commence or prosecute Proceedings in relation to antecedent Offences — Condonation—Discretionary Bar—Dismissal of Petition.

A husband and wife had separated in 1886 under a deed which contained the following clause: "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents." In 1890 the wife presented a petition for judicial separation on the ground of adultery committed in the years 1889 and 1890, and the husband in his answer charged his wife with adultery committed in the years 1884 and 1885. At the trial both parties were found guilty of adultery:—

Held, that the covenant in the deed of separation was not equivalent to condonation, and that it did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed.

THIS was a petition presented by Lady Gooch in 1890, praying for a judicial separation from her husband, Sir Alfred Sherlock Gooch, on the ground of his adultery committed in the years 1889 and 1890.

The respondent in his answer denied the adultery, and charged the petitioner with divers acts of adultery committed at hotels in Bath and Bristol with George Henry Eden, in the years 1884 and 1885, and prayed that her petition might be dismissed.

The petitioner's reply was as follows:—

"1. That she denies the several acts of adultery alleged against her.

"2. That the said acts, if any, were condoned by the respondent.

"3. That the respondent is not entitled to set up such acts of adultery, if any, by virtue of the covenant contained in paragraph 10 of a deed of separation executed by him and the petitioner, dated July 9, 1886, to which the petitioner craves leave to refer."

In compliance with an order made by the registrar, the petitioner filed the following particulars of the alleged condonation: "The several acts of adultery alleged by the respondent in his answer are acts of adultery with one Eden, and are alleged to have been committed by the petitioner prior to the year 1886.

"On July 9, 1886, a deed of separation was signed by the petitioner and respondent, with a view of putting an end to all questions and cross-charges, including the charge of adultery with the said Eden by the petitioner, and the parties to the said deed expressly agreed as follows, in paragraph 10 of such deed: 'No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists, or which has arisen before the date of these presents.' The said deed in its entirety is still a binding and subsisting agreement between the petitioner and respondent."

In her further and better particulars of the alleged condonation, the petitioner stated that she lived and cohabited with the respondent as his wife at Benacre Hall, Suffolk, and at Malvern Hall, Warwickshire, up to March, 1886, and at the respondent's chambers in Piccadilly, London, in March, 1886, and that all misconduct, if any, was in fact condoned.

The rejoinder, filed on behalf of the respondent, was as follows:—

1. Joinder of issue upon the 1st paragraph of the reply.

2. Denying that the petitioner's adultery was condoned by him, and taking issue thereon.

3. That paragraph 10 of the deed did not contain any such covenants as alleged.

4. That the allegations in paragraphs 2 and 3 of the reply were immaterial.

There was one child of the marriage, now eleven years old, over whom both parents had a joint control.

The case was heard before the President and a special jury, and the jury found that both the petitioner and respondent had committed the acts of adultery charged against them in the petition and the answer.

Lockwood, Q.C. (*Deane*, with him), on behalf of the petitioner. The Court has a discretion to grant a decree of judicial separation. The object of the petitioner in instituting the suit was not to obtain an increase in the amount of her allowance, which, according to *Gandy* v. *Gandy* (1), could not be obtained, but to obtain a control over the education of her son, the only child of the marriage. The case is not to be decided by s. 31 of the Divorce Act, but on the principles which guided the Ecclesiastical Court in suits for divorce a mensa et thoro; and the Court has always shewn more latitude in exercising its discretion in suits for judicial separation, where there is no change of status, than in suits for divorce. The deed has the effect of condonation, and where there is condonation the Court has a discretion. In *Anichini* v. *Anichini* (1), though there had been condonation, the Court granted a judicial separation; and in *Morgan* v. *Morgan and Porter* (2), the Judge Ordinary approved of the decision in *Anichini* v. *Anichini* (1), and said that on the proper occasion it would be very fitting to consider whether the views therein expressed should not be adopted in applying the discretion vested in the Court by s. 31 of the Divorce Act of 1857. In *Seller* v. *Seller* (3), and in *Goode* v. *Goode and Hamson* (4), and in *Collins* v. *Collins* (5), it was held that adultery followed by condonation would be no bar to relief. The effect of clause 10 of the deed is to blot out all that happened before it was entered into. Both parties agreed that in the future no proceedings should be taken in respect of any antecedent offences. The respondent covenanted that no proceedings should be "commenced or prosecuted" by or on behalf of either party against the other in respect of any cause of complaint arising before the date of the deed, and by setting up the alleged antecedent adultery of the petitioner he has "prosecuted" a proceeding in contravention of the terms of the agreement. The deed is equivalent to an estoppel. The parties have agreed to take their own remedy by a separation: *Besant* v. *Wood*. (6) *Rowley* v. *Rowley* (7) and *Rose* v. *Rose* (8) are authorities for holding that such bargains are not contrary to public policy, and that they amount to a final condonation. Here the wife does not rely on any antecedent offence, and if she were not entitled to relief it would amount to leave and licence to the respondent to go on committing adultery for the rest of his life.

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(1) 7 P. D. 168.

(1) 2 Curt. 210.
(2) Law Rep. 1 P. & D. 644.
(3) 1 Sw. & Tr. 182.
(4) 2 Sw. & Tr. 253.
(5) 9 App. Cas. 205.
(6) 12 Ch. D. 605.
(7) Law Rep. 1 H. L., Sc. 63.
(8) 8 P. D. 98.

Sir E. Clarke, Q.C. (*Lewellyn Davies*, with him), for the respondent. The Court is asked on a technical construction of the terms of this deed to do that which the Court has never done before—to give relief to a woman who has been guilty of the most flagrant adultery. *Anichini* v. *Anichini* (1) is the only case in which a woman who had been guilty of adultery was held to be entitled to a judicial separation. But there had been condonation there—and in this case there has been no condonation. The parties have lived separate ever since the deed, and the terms of the deed, to which a larger scope must not be given than they will naturally bear, do not amount to condonation. The respondent undertakes by the deed not to "commence or prosecute" any proceeding against his wife on account of antecedent offences; but it cannot be said that in praying the Court to dismiss the wife's petition he is "commencing or prosecuting" any proceeding. In *Rose* v. *Rose* (2) the agreement was much more stringent for in addition to the words which in this case are found in clause 10, it goes on to say, "and every offence, if any, which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct, shall be pleaded or alleged by either party or shall be admissible in evidence." In *Harris* v. *Harris and Wooden* (3), also, the same language was employed, and it cannot be argued that if it had been intended in this case to obliterate all past offences by a general condonation, this deed would not have been in the same form. The terms of the deed have not been violated by anything which the respondent has done; and the Court will not construe it as if it contained words the effect of which would be to infringe the rule on which the Court has always acted in requiring purity on the part of the wife who seeks for relief. In *McCord* v. *McCord* (4), *Story* v.

(1) 2 Curt. 210.

(2) 8 P. D. 98.

(3) 41 L. J. (P. & M.) 61.

(4) Law Rep. 3 P. & D. 237.

Story and O'Connor (1), and in *Stoker* v. *Stoker* (2), condonation was held not to bar a petitioner from obtaining relief; and in *Otway* v. *Otway* (3) the Court of Appeal laid it down in the broadest terms that a wife who had been guilty of adultery was not entitled to a judicial separation. There must be condonation to give the Court a discretion, and this deed, which is not equivalent to condonation, cannot give the Court a discretion which it would not otherwise have.

Cur. adv. vult.

THE PRESIDENT. On the finding of facts by the jury the respondent, Sir Alfred Gooch, was guilty of adultery after the separation deed of July 9, 1886, and the petitioner, Lady Gooch, was guilty of adultery before it.

It cannot be disputed that, but for some effect of the deed of 1886, the adultery of the petitioner must prevent her from obtaining the decree of judicial separation which she seeks. The case of *Otway* v. *Otway* (3) is alone sufficient authority for the proposition that the adultery of a petitioner in a suit for judicial separation is, unless its effect be in some way neutralized, a bar to the obtaining of the relief asked.

Now, what is there in the present case to neutralize the proved adultery of the petitioner?

Whether or no condonation could have such an effect, condonation in the proper and what I think should be sole use of the word—namely, forgiveness evidenced by conduct and, according to English law, conditional on future good behaviour—there is none. It was pleaded, but no attempt was made to prove it. The separation deed was executed after accusations of the wife by the husband, which he emphatically refused to withdraw, and subsequently to the deed the parties never lived together.

But it is argued that, by reason of the tenth clause in the deed of separation, I have a discretion to grant, and should exercise it by granting, the judicial separation prayed. The tenth clause is in these words: "No proceedings shall be commenced or prosecuted by or on behalf of either party against the

(1) 12 P. D. 196.

(2) 14 P. D. 60.

(3) 13 P. D. 141.

other in respect of any cause of complaint which now exists or has arisen before the date of these presents."

Unless these words, on their true construction, amount to a covenant not to plead the adultery of the petitioner, as the respondent has pleaded it, they constitute no imaginable reply to the respondent's plea. Do they, then, express any obligation on the part of the respondent not to set up his wife's adultery as an answer to the charge against him? I am clearly of opinion that they do not. If it had been intended that such an obligation should be imposed, nothing would have been easier than to have used language of which the import would have been unambiguous. A well-known precedent exists in the case of *Rose* v. *Rose*. (1) There the opening words of the clause are identical with those in the present case; but there the clause goes on, "and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct, shall be pleaded or alleged by either party or be admissible in evidence." It is difficult to imagine why similar words do not appear in clause 10, unless it was expressly intended to exclude their obvious effect.

Nor do the words employed appear to me apt to forbid the use of past misconduct as a defence. Reliance was placed by Mr. Deane on the phrase "commence or prosecute," and it was suggested that the words "or prosecute" were added to cover the case of a charge being set up by a respondent. But it was afterwards observed by Mr. Lockwood, and it is of course the case, that as regards charges of misconduct before the deed the respondent's action is that of commencing as much as of prosecuting them. It would be possible, I think, to suggest more than one reason why the word "prosecute" was subjoined to the word "commence." But I do not think that the signi-

(1) 7 P. D. 225; 8 P. D. 98.

ficance of the clause turns on these words. It appears to me that the respondent in putting forward his wife's adultery solely as a defence, and not making it the foundation of any prayer of his own, does not, in any proper sense of the words, either commence or prosecute proceedings against her. Any illustration is apt to be idem per idem; but it would, I think, be a strained use of language to say that a defendant in setting up fraud in a prospectus in an answer to an action for calls was commencing proceedings against the promoters, that a defendant in resisting a grant of probate on the ground of undue influence was commencing proceedings against the executors, or that a husband pleading the adultery of his wife in answer to a tradesman's account for necessaries was commencing proceedings against the tradesman in respect of his wife's misconduct.

It was urged before me that so to read the deed gives the husband licence to commit adultery without fear of interference by his wife. This seems to me a fallacy. No doubt a husband whose wife commits adultery obtains—certainly if he does not condone it, and perhaps if he does—immunity from a petition for divorce or judicial separation, whatever be his subsequent conduct. But such immunity results from provisions of the law, and a deed does not confer it by abstaining from taking it away.

In short, the misconduct of a wife gives the husband two rights—one to sue for relief, the other to resist a claim for relief by the wife. It may well be that a husband is willing and agrees to part with the former right, but not with the latter; and this, I think, is what the respondent in this case has done.

In this view it is not necessary to decide what would be the effect of such a covenant as that contained in the words I have quoted from *Rose* v. *Rose*. (1) No doubt in cases of judicial separation condonation gives to the Court a discretion to grant the relief sought notwithstanding the adultery of the petitioner. The case of *Anichini* v. *Anichini* (2), recognised as it is in *Morgan* v. *Morgan and Porter* (3), *Goode* v. *Goode and Hamson* (4), *McCord* v. *McCord* (5), and *Conradi* v. *Conradi* (6), may, I think, now be

(1) 7 P. D. 225; 8 P. D. 98.
(2) 2 Curt. 210.
(3) Law Rep. 1 P. & D. 644.
(4) 2 Sw. & Tr. 253.
(5) Law Rep. 3 P. & D. 237.
(6) Law Rep. 1 P. & D. 514.

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taken as establishing such a proposition. An analogous discretion, in cases of dissolution, was conferred on the Court by the 31st section of the Act of 1857, although the cases point to a use of it only under exceptional circumstances: see *Seller* v. *Seller* (1), *Morgan* v. *Morgan and Porter* (2), *Goode* v. *Goode and Hamson* (3), *Collins* v. *Collins* (4), *Story* v. *Story and O'Connor* (5), and *Stoker* v. *Stoker* (6), and it appears to me that the argument addressed to me by Mr. Deane that the discretion may be somewhat wider in cases of judicial separation than of dissolution is well-founded in reason, and finds support in some expressions used in the judgment in the case of *McCord* v. *McCord.* (7)

It may also be, though as to this I entertain considerable doubt, that an agreement that past misconduct is to be deemed to be condoned, or a covenant not to set up past misconduct as a defence, confers on the Court the same discretion as is conferred by condonation. It is to me by no means clear that the parties can at their pleasure confer by agreement on the Court the same discretion which the Court founds on their actual conduct. I am not sure that they can give the Court a jurisdiction to refuse the prayer of a petition by agreeing that they should be deemed to have condoned when in fact they have not, any more than they could give a jurisdiction to grant the prayer of a petition by agreeing that cruelty should be deemed to have been committed when, in fact, it had not.

But it is clear, I think, that the parties cannot, by stipulation, produce any higher effect than they can by condonation, or can impose on the Court the necessity of granting a judicial separation notwithstanding the adultery of the petitioner. It is clear from the authorities ending with the cases of *Rowley* v. *Rowley* (8), *Besant* v. *Wood* (9), and *Rose* v. *Rose* (10), that no rule of public policy, nor any other rule, prevents parties from agreeing that they will not found an application to the Court on past misconduct. The view of the law in the present day, no doubt, is that, as parties can compromise, and agree to compromise, a suit, so they can agree not to bring it, or can agree not to put forward specified matters as foundation for it. But it is altogether another thing to say, and I do not think that any of the last-mentioned cases shew, that the parties can by any arrangement between themselves dictate to the Court on what principle relief sought is to be granted. If it is a rule that an adulterous spouse cannot obtain a judicial separation or dissolution except under certain special circumstances recognised by judicial authority, the parties, surely, cannot by any agreement relax or modify that rule. They may contract themselves out of their rights, but they cannot contract the Court out of its duty. That would be to make a law for themselves.

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(1) 1 Sw. & Tr. 182.
(2) Law Rep. 1 P. & D. 644.
(3) 2 Sw. & Tr. 253.
(4) 9 App. Cas. 205.
(5) 12 P. D. 196.
(6) 14 P. D. 60.
(7) Law Rep. 3 P. & D. 237.
(8) Law Rep. 1 H. L., Sc. 63.
(9) 12 Ch. D. 605.
(10) 8 P. D. 98.

I have touched on these points because, having had all the facts of the case before me, it appears to me right to say that, if the terms of the deed give me a judicial discretion whether the adultery of the petitioner should bar her claim to a judicial separation, I cannot think that there are any such exceptional circumstances as would justify me in granting the prayer of the petitioner. The respondent was guilty of adultery since the deed of separation, and some years before it he was guilty of conduct of which I was obliged to express my opinion to the jury in terms I do not wish to repeat. But I do not think that misconduct of the respondent before the deed, nor, of course, since it, conduced to the petitioner's misconduct. On the other hand, while not forgetting the terrorism exercised at some period over the petitioner by her paramour, and also giving weight to the absence of any charge of misconduct after the separation, I cannot help saying that her misconduct was singularly persistent, and, in respect of its open character, singularly degrading to the husband; and I think, further, that her attachment for the man to whom I have referred, deepened, if it did not originate, the estrangement between herself and her husband, and causing, as it did, their eventual separation, placed him in a position, which conduced to, though it does not justify, his recent misconduct. Such a state of things does not fall within the principle of any of the cases in which, notwithstanding the adultery of the petitioner, either dissolution or judicial separation has been granted.

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I have hesitated whether, as the wife has a substantial income, she should not pay the costs, with a set-off in regard to the point on which she was successful; but, on the whole, especially as there were grave faults on both sides, I think there should be no order as to costs.

Petition dismissed.

Solicitors for petitioner: *Hemsley & Hemsley.*

Solicitors for respondent: *Lewis & Lewis.*

W. L.

1893
Jan. 24.

IN THE GOODS OF CRAWSHAY.

Probate—Will—Disappearance of Executor—Administration with Will annexed to Deceased's Sole Beneficiary—20 & 21 *Vict. c.* 77, *s.* 73.

An executor, before the death of the testator, left the country under an assumed name, having sold all his effects, and there was reason to believe that he did not intend to return:—

Held, that administration with the will annexed might be granted to the testator's widow, who was the sole beneficiary, without requiring the executor to be cited.

APPLICATION for administration with the will annexed.

Herbert H. Crawshay, late of St. Aubyn's, Brighton, died on November 12, 1892, at Biarritz, having duly executed his last will, dated February 24, 1891, and leaving his widow, Maria Courtenay Crawshay, and several children surviving him.

By this will he bequeathed all his real and personal estate to Mrs. Crawshay, and he appointed her guardian of his children. He nominated Mr. Ernest Jerdein, of the Isthmian Club, London, the sole executor of his will.

From the affidavits of the widow and her solicitor, made in support of the motion, it appeared that in the month of August, 1892, Mr. Ernest Jerdein suddenly left this country under an assumed name, without leaving any address, having first sold all his effects to his landlord, to whom he stated that he was going to San Francisco. Inquiries were made, but no information could be obtained as to his whereabouts; and there was every reason to believe that he had no intention of returning to this country. After the flight of Mr. Jerdein, the testator expressed his intention of cancelling his appointment of him as his executor,

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and of appointing his wife executrix in his place; but his last illness was short, and he died before he could alter his will.

Deane, now moved for a grant of administration with the will annexed to the widow, under s. 73 of the Court of Probate Act.

[THE PRESIDENT. Ought not the executor to be cited?]

The special circumstances of the case are such as are contemplated by s. 73. There is no executor in the country ready to take the grant. It is one of the cases to which s. 73 is intended to apply.

THE PRESIDENT. On the whole, and under the special circumstances of the case, considering the strength of the affidavits and the persons by whom they are made, and also considering the fact that the widow is the sole beneficiary, I think I am justified in making a grant of administration to her with the will annexed.

Solicitors: *Carlisle, Unna & Co.*

W. L.

THE ALPS.

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Feb. 14.

Admiralty—Marine Insurance—Charterparty—Chartered Freight—Damage by Fire—Want of Repair—Causa proxima—Order XXXIV., *r.* 2.

By a charterparty the charterer agreed to pay the plaintiffs so much per month for the hire of their vessel, provided that "in the event of loss of time from . . . want of repairs . . . preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service."

By a policy effected with the defendants, the plaintiffs insured the "chartered freight" and the clause, enumerating the perils against which the assured were indemnified, was in the usual form, viz. "of the seas . . . fire . . ." &c.

The plaintiffs' vessel was damaged by fire, and, under the above clause in the charterparty, the payment of the hire ceased for the thirteen days occupied in repairs.

In an action brought by the plaintiffs on the policy to recover the amount so lost:—

Held, that the defendants were liable, as the clause in the charterparty was put into operation through the immediate action of the perils insured against.

HEARING, upon point of law, in an action upon a policy on chartered freight of the steamship *Alps*.

The plaintiffs were the Mersey Steamship Company, Limited; the defendants were the Thames and Mersey Marine Insurance Company, Limited.

The facts (which were not in dispute) were shortly that—

By charterparty, dated April 12, 1890, entered into at New York by Pim Forwood & Co., agents for the plaintiffs, the owners of the steamship *Alps*, and George Christall of the Trinidad Steamship Company of New York, charterer, the plaintiffs agreed to let, and the charterer to hire, the *Alps* at the rate of 425*l.* per calendar month, and at and after the same rate for any part of a month, payment to be made in cash at New York monthly in advance at current rates of exchange. "In the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. . . ."

By a policy of insurance, dated June 11, 1891, effected with the defendants, the plaintiffs insured, for twelve calendar months, 1000*l.* "chartered freight," including all liberties as per bill of lading, in the ship *Alps* "and touching the adventures and perils which the capital stock and funds of the (defendant) company are made liable unto, or are intended to be made liable unto, by this insurance they are: of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all Kings, Princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt detriment or damage of the aforesaid subject-matter of this insurance or any part thereof."

On August 18, 1891, the vessel was lying at the Union Stores, Brooklyn, where she was taking in cargo, and, about 3.30 A.M., she was discovered to be on fire. By pouring water on the fire it was extinguished, but on examination it was found that the forepeak was completely burnt out. The upper deck was also badly burnt, as well as various sails and stores belonging to the vessel, including towing hawser, and the skin of the vessel was injured by the heat.

The vessel was repaired, and the hire, for the thirteen days occupied in repairing her, amounting to 179*l.* 5*s.* 6*d.*, was repaid to the charterer.

Insurances to the extent of 2500*l.* had been effected, and, by an average statement, a claim for 35*l.* 3*s.* 1*d.* was adjusted for loss of hire under the charterparty against the defendant company's policy for chartered freight.

On February 2, 1893, the plaintiffs issued their writ claiming this proportion of the particular average loss applicable to this policy, and on February 9, Gorell Barnes, J., by consent, made an order (under Order xxxiv., r. 2) (1), that "the question of law whether the plaintiffs upon the facts stated in the average statement, and the documents therein referred to" (viz. the charterparty and policy of insurance), "are entitled to recover any, and what, sum from the defendants, be tried without a special case."

On February 14, the case was argued upon the documents, without pleadings, or admissions, by:—

Pickford, and *Maurice Hill*, for the plaintiffs. There was a loss of the chartered hire of the ship directly resulting from a peril against which the defendants had undertaken to insure. The provision in the charterparty is that the payment of hire shall definitely cease during the disablement of the vessel, her continued efficiency being a condition precedent to the payment of the hire, and therefore the case falls within the words of Lord Watson in the House of Lords in the *Inman Steamship Co.* v. *Bischoff* (2), "If it had been expressly stipulated in the charterparty that freight should cease to be payable so long as the ship

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(1.) Rules of Supreme Court, 1883, Order xxxiv., r. 2 : "If it appear to the Court or a judge, that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried . . . the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case, or in such other manner as the Court or judge may deem expedient . . . ."

(2) 7 App. Cas. 670, at p. 690.

was incapable from that cause" (perils of the sea) "from efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against." The judgment in the Court of Appeal (1), and of Lord FitzGerald in the House of Lords (2), have reference to the circumstances of that case where there was no immediate connection between the occurrence of a peril of the sea and the action of the charterers in making an abatement out of the hire, and would not apply even to a case where the charterparty provided that the charterer should have a cancelling option on the disablement of the vessel by sea peril; but, in the present case, the payment of freight is to determine irrespective of any action of the charterer on the disablement of the vessel.

If, in the case cited, the stoppage of freight had been by the terms of the charter a consequence which followed as a matter of course, and as a matter of right, from the grounding of the ship, then it is clear, from the language of the judges in the Court of Appeal, that they would have held the underwriters to be liable for the loss; but they went on the ground that there had been no loss of freight at all, but merely a fine, more or less arbitrarily inflicted.

[They were stopped by the Court.]

Joseph Walton, Q.C., for the defendants. It is submitted that this case is concluded by the decision of the House of Lords, confirming the Court of Appeal, in *Inman Steamship Co.* v. *Bischoff* (3). In that case, as in this, the casualty would not of itself have occasioned any loss of hire, but for the conditions of the charterparty, and, though there are points of difference, the principle underlying the two cases is the same. The loss of hire arose from the terms of the contract, and was not directly caused by a peril insured against, as, but for the special clause in the charter, the hire would have continued during the time occupied in repairing the damage caused by the fire. The fire was possibly the causa sine quâ non, but it was not the causa proxima—that is, the loss was a loss by contract, not by fire. If it had been intended to cover this loss, nothing would have been easier than to have framed the policy so as to insure this special risk; but it is a novel contention that the ordinary policy on freight will cover loss of hire arising out of a disablement clause in the contract of affreightment between the assured and a third party. The decision of four of the judges in the case of *Inman Steamship Co.* v. *Bischoff* (1) rests upon the well-established rule of causa proxima. In the Court of Appeal, Bramwell, L.J., giving judgment for Lord Coleridge, C.J., Baggallay, L.J., and for himself, said (2): "The question still arises, Was the loss of the freight a loss by perils of the seas? We are of opinion it was not. We are of opinion that but for the particular clauses in this charterparty, freight would have continued to be earned, notwithstanding perils of the seas . . . . But for the clause in question . . . . the time in the charterparty would have run during the time of those repairs . . . . The perils of the seas, therefore, have not caused the loss of freight. They are causa sine quâ non, but not causa causans, not the proximate cause of the loss. Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, not been injured, but put out of pay. That would have been a loss in one sense by perils of the seas, no less than this, but clearly not covered by the policy." And, in the same case in the House of Lords, Lord FitzGerald (3) said, "If, however, there was a loss of freight, it would remain to be considered whether 'peril of the sea' was the immediate cause of the loss. The maxim, 'In jure non remota causa sed proxima spectatur' applies specially to marine insurances, so that in order to entitle the claimants to recover here, the loss must be a direct, and not a remote, consequence of the peril of the sea. The touching on the Roman Rock was a peril of the sea, and, probably, but for that, the ship would have completed her undertaking, and earned her two months' freight; but it does not follow that the touching on the rock, and consequent injury, were the causa causans. The freight was not necessarily and directly lost by that calamity and the consequent necessity for repairs. The plaintiffs were deprived of the right to their freight, if they were

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(1) 6 Q. B. D. 648, at p. 651.

(2) 7 App. Cas. 670, at p. 691.

(3) 6 Q. B. D. 648; 7 App. Cas. 670.

(1) 6 Q. B. D. 648; 7 App. Cas. 670.

(2) 6 Q. B. D. 648, at p. 652.

(3) 7 App. Cas. 670, at p. 692.

so deprived, by the action of the commissioners, or their officers, under the special provisions of the charterparty. The loss was not by the perils of the sea, but was occasioned by the contract. I concur in the opinion of Bramwell, L.J., in this case, that the loss was not the necessary and proximate effect of the perils of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other."

Here, as in *Inman Steamship Co.* v. *Bischoff* (1), the temporary disablement of the vessel would not, of itself, have entitled the charterer to refuse payment of the hire during the period of disablement. His right to do so arose out of the terms and conditions of the charterparty, which terms and conditions are, according to the House of Lords in *Inman Steamship Co.* v. *Bischoff* (1), not incorporated in the policy to the extent of rendering the insurers liable for any loss which may arise from their operation if that loss would not have arisen out of the casualty itself independently of the terms and conditions.

[GORELL BARNES, J. Is freight ever lost proximately?]

It must be admitted that freight depends upon contract, and a well-known clause in the policy would have covered this risk. Here the loss arose, not from perils of the sea, but because it fell within the clause in the charter. The fire created the want of repair, but it was the want of repair that made the clause operate. Time may be lost by the shipowner, and yet the hire not be lost, if it does not fall within the clause—as, for example, if the repairs were done within twenty-four hours, there would be no loss of hire.

[The following cases were referred to: *Mercantile Steamship Co.* v. *Tyser* (2); *Jackson* v. *Union Marine Insurance Co.* (3)]

GORELL BARNES, J. (after referring to the dispatch with which the case had proceeded, and to the economy resulting from following the simple procedure which had been adopted, the learned judge detailed the facts already set out, and having summarised the contents of the documents which had given rise to the point of law, continued). The question arises whether or not the loss was caused by the perils insured against, or one of them, or, as counsel for the defendants contend, is to be treated as a loss not due to the perils insured against proximately, but to the effect of the clause in the charter.

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(1) 7 App. Cas. 670.

(2) 7 Q. B. D. 73.

(3) Law Rep. 8 C. P. 572; 10 C. P. 125.

The case which both parties agree is decisive of this, according to the way it is looked at, is that of *Inman Steamship Co.* v. *Bischoff*, reported in the Court of Appeal (1) and in the House of Lords. (2) The plaintiffs there sought to recover, under a policy upon "freight outstanding," for loss of hire which had been caused by the Commissioners of the Admiralty putting the ship off pay under a special clause in the charterparty which had been effected for the vessel.

It is unnecessary to criticise that case with any great accuracy so far as its own terms are concerned, because it is obvious that Lord Bramwell, in dealing with that case, said that the Commissioners, acting under the clause, put the ship out of pay, and then he proceeds to say that no doubt in that case the loss of hire was not to be treated as having been a loss due to the perils of the sea; because he considered in that particular case it was not proximately so caused. In the House of Lords, Lord Selborne says (3): "The result is, that, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charterparty, but to have been subsequently in July, 1879, defeated, under the power of abatement by way of mulct reserved by the contract to the Board of Admiralty. It has not been without doubt, or (I must add) without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against, as to make it payable under the terms of the policy by the insurers." Then he goes on to say: "The general principle of causa proxima, non remota, spectatur is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent," and that that is apparent from certain observations to which he refers. Then he

(1) 6 Q. B. D. 648.

(2) 7 App. Cas. 670.

(3) 7 App. Cas. 670, at p. 675.

proceeds, a little later on: "If, in the present case, the other terms of the charterparty being the same, a power had been reserved to the charterers or their agents to determine the contract, and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels. But between such a case and that of a subsequent mulct under a special power, such as that contained in this charterparty, after freight had been earned which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson* (1), *Taylor* v. *Dunbar* (2), and *McSwiney* v. *Royal Exchange Assurance Corporation* (3), seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, under such circumstances, of such a special power is different from the risk of loss by perils of the seas, and ought to have been insured against in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined, it seems to be a real distinction, and to justify the judgment of the Court below." Then Lord Blackburn says (4), after commenting upon the way in which the charterparty must be looked at: "But as soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charterparty a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss." And then he comments upon the doctrine of causa proxima, non causa remota, spectatur, and says (1): "I must own that I have always sympathised with Lord Colonsay in *Rankin* v. *Potter* (2), where he says, 'Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes;' which I think he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the fact it is best to keep clear of such philosophical mazes. And, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight."

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(1) 3 B. & P. 388.

(2) Law Rep. 4 C. P. 211.

(3) 14 Q. B. 634.

(4) *Inman Steamship Co.* v. *Bischoff*, 7 App. Cas. 670, at p. 678.

Now I do not say that the counsel for the defendants has led me off into a philosophical maze, but he has, with great ingenuity, endeavoured to point out how, under certain circumstances, a claim can be made under this policy for a partial loss, so that, as he contended, full effect might be given to the policy without allowing such a claim as that in question. But that does not seem sufficient to conclude this particular case. Lord Watson says (3), putting it shortly: "If I am right in my construction of the charterparty, the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risks insured by the policy; and if it had been expressly stipulated in the charterparty that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her

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(1) 7 App. Cas. at p. 683.

(2) Law Rep. 6 H. L. 160.

(3) *Inman Steamship Co.* v. *Bischoff*, 7 App. Cas. 670, at p. 690.

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Gorell Barnes, J.

contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against. But that is not the present case."

I apply that language to this case. The inefficiency of this vessel was admittedly due to the fire, one of the perils insured against. It has been expressly stipulated in the charterparty that, in the event of loss of time from want of repairs, the hire should cease to be payable so long as the vessel was incapable from that cause of efficiently performing her service. It is a case of cesser, or loss of freight, through a peril insured against. The counsel for the defendants urges that many other causes might produce want of repairs. Yes; but only certain perils are insured against, one of which is fire, and it seems to me that, having regard to the judgments I have referred to, and the principles they seem to indicate, and also to the case of *Jackson* v. *Union Marine Insurance Co.* (1), the true view to take of an insurance such as this, applied to a very ordinary form of charterparty, containing a very ordinary and usual clause, is that it casts upon the underwriters the risk of loss of freight when that clause is put into operation through the immediate action of the perils insured against.

I therefore think that the plaintiffs are entitled to succeed, and my judgment will be for them for the sum of 35*l.* 3*s.* 1*d.* I do not suppose interest is asked for; but this being a test case, I certify that it is a proper one to have been tried in the High Court.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Bateson, Warr, & Bateson, Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

(1) Law Rep. 8 C. P. 572; 10 C. P. 125.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1893
Feb. 28;
March 1.

THE EIDER.

Admiralty—Salvage—Practice—Contract made by Foreigners for Salvage of Foreign Ship in English waters—Non-payment of Salvage—Place of Payment—Lien on Ship and Cargo—Service out of the Jurisdiction—Rules of the Supreme Court, 1883, *Order* XI., *r.* 1 (*e*).

By Order XI., r. 1: "Service out of the jurisdiction of . . . . notice of a writ of summons may be allowed . . . . whenever (*e*) the action is founded on any . . . . alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction. . . . ."

A foreign ship, owned by the defendants, a German company carrying on the business of shipowners in Germany, stranded within the three-mile limit on the English coast. Her master, a German, entered into a contract, in the German language, with the plaintiffs, a Swedish salvage company, and also with a German salvage company, by which these two salvage companies jointly undertook to do their best to salve the ship, and her cargo, and convey them to a neighbouring English port, "against a salvage reward, or compensation, of 50 per cent." of the value of the property in the salved condition. In case of disagreement, the value was to be determined by arbitration, and the salvage money was to be paid, within ten days after the salvage had been effected, to the German salvage company, who were to have a lien on ship, and cargo, until payment, but no place of payment was specified.

The ship was floated, and together with a great part of her cargo, conveyed to the named English port. The salvage on the cargo was paid, but the parties disagreed as to the valuation of the ship, and the amount was determined by arbitration.

The plaintiffs obtained leave, ex parte, to serve the defendants, out of the jurisdiction, with notice of a writ of summons, in an action in the Admiralty Division, for a moiety of the 50 per cent. of the value as determined by arbitration; but, after argument, the President discharged the order, and set aside the writ of summons.

The plaintiffs appealed:—

Held, by the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.), that the decision of the President must be affirmed, as there was no obligation to pay the salvage money within the jurisdiction, and therefore no breach within the meaning of Order XI., r. 1 (*e*).

APPEAL by plaintiffs, against an order of the President of the Probate, Divorce, and Admiralty Division (Admiralty), discharging an order giving leave to serve the defendants, out of the jurisdiction, with notice of a writ of summons, and setting aside the writ.

The plaintiffs were the Neptun Salvage Company, incorporated according to the law of Sweden, and carrying on, at Stockholm, the business of salvors of property lost or in peril at sea. The defendants were the Norddeutscher Lloyd, a company incorporated according to the law of Germany, and carrying on the business of shipowners in Bremen.

The facts—so far as material, on the question, whether, within the meaning of Order XI., r. 1 (*e*) (1), there was a breach within the jurisdiction, of a contract entered into between the plaintiffs and the defendants—were shortly as follows:—

On January 31, 1892, the steamship *Eider*, belonging to the defendants, and laden with a general cargo, whilst on a voyage from New York to Bremen, stranded on Atherfield Ledge off the Isle of Wight.

On February 4, a contract, in triplicate, in the German language, was signed, in the Isle of Wight, by the master of the *Eider*, on the one part, and an agent of the Nordischer Bergungs-Verein (a German salvage company carrying on business at Hamburg), and an agent of the plaintiffs on the other part. The signatures were witnessed by a representative of the defendants, and by the German Vice-Consul at Portsmouth.

The contract was filled in on one of the printed forms of the Nordischer Bergungs-Verein, and was headed "Salvage contract." By it the two salvage companies jointly undertook to do their best to salve the *Eider* and her cargo, and convey them to Southampton, "against a salvage reward or compensation" of 50 per cent. of the value of the property in the salved condition. In the event of an agreement as to the value not being arrived at, arbitrators were to be chosen, and an umpire selected by them. The agreed salvage money was to be paid to the Nordischer Bergungs-Verein, within ten days after the salvage had been effected, and the Nordischer Bergungs-Verein were to have a lien upon ship, and cargo, until the salvage money was paid, with interest at 1 per cent. per month, if not paid when due.

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(1) Rules of the Supreme Court, 1883, Order XI., r. 1: "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever:—

(*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction. . . ."

It was alleged that the name of the plaintiffs, the Neptun Salvage Company, was omitted by inadvertence, in the paragraphs subsequent to the first; but the plantiffs, and the other salvage company, agreed that any benefits arising under the contract should be equally divided between them.

As the result of the salvage operations undertaken by the plaintiffs, and the other salvage company, a large portion of the cargo was salved, and the *Eider* herself, after being successfully floated, was, on March 30, safely docked at Southampton.

The parties to the contract agreed upon the value of the cargo, and the greater part of the salvage reward of 50 per cent. was paid in this country by the agents of the defendants to the general agents in London of the plaintiffs, and the particular agents for this purpose of the Nordischer Bergungs-Verein; but the parties could not agree as to the value of the ship, and therefore arbitrators were appointed by the master of the *Eider*, and by the plaintiffs, and the other salvage company. These arbitrators nominated a German umpire, and, as they disagreed, the umpire, on June 29, made and published an award in Germany, which was deposited in the Court for commercial causes in Bremen.

By this award the salved value of the ship was assessed at such a sum, in German money, as, at the current rate of exchange, was equivalent to 51,461*l.* 11*s.*, of which one half, or 25,730*l.* 15*s.* 6*d.* became due as salvage, together with interest at 1 per cent. per month from April 10.

On October 3 a suit for necessaries was instituted in the Admiralty Division by Keller, Wallis, & Co., a firm of shipbrokers and agents at Southampton, claiming 2200*l.* against the *Eider*. To this action the defendants did not appear, and, the ship having been arrested, was, on November 1, ordered to be sold. Under this order the *Eider* was sold at a price which, after deducting the marshal's fees and expenses, left only about 6000*l.* as proceeds in court.

On November 8 the plaintiffs and the Nordischer Bergungs-Verein commenced an action, in rem, against the *Eider*, to recover the salvage money; and the Nordischer Bergungs-Verein commenced proceedings in personam in Bremen against the defendants, and obtained the judgment of the German Court for their share of the salvage money, viz., one-fourth of the value fixed by the award with interest at 1 per cent. per month, with, however, the limitation that the defendants were only to be personally liable to the extent of the steamship *Eider* and of her gross freight on her last voyage. (1)

To these proceedings in Germany the plaintiffs were no parties, but—

On December 29 the plaintiffs made an ex parte application to the President in chambers, and obtained an order giving them leave to issue a writ of summons in personam against the defendants, with liberty to serve them out of the jurisdiction, with notice of the issue of the writ, for the recovery of 12,865*l.* 7*s.* 10*d.*, being one-fourth of the value of the *Eider* as determined by the award, together with interest at 1 per cent. per month, less any sum that might be obtained by the plaintiffs out of the proceeds of the *Eider*.

The defendants entered a conditional appearance, and, on January 24, 1893, moved before the President to discharge the above-mentioned order.

Sir R. E. Webster, Q.C., *English Harrison*, and *Butler Aspinall*, for the defendants. It is submitted that no proper grounds were disclosed by the affidavits used in support of the ex parte application for leave to issue the writ, and that the Court has been misled by the statement in one of these affidavits that "Under the terms of the said contract the salvage money became payable in England, and the failure to pay the same constituted a breach of the said salvage contract, and such breach arose within the jurisdiction of this Honourable Court." There is no stipulation in the contract that the salvage money is to be payable in

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(1) The action in rem brought by the plaintiffs and by the Nordischer Bergungs-Verein, and the suit for necessaries of Keller, Wallis, & Co., came on for trial in the Admiralty Division, before Gorell Barnes, J., on March 22, 1893; but it appearing that the judgment obtained abroad by the Nordischer Bergungs-Verein was under appeal, both the actions were adjourned generally.

England, nor does payment in England follow from the facts as a conclusion of law, for whilst the *Eider*, a German ship flying the German flag, was ashore below low-water mark, within the three-mile limit, her master, a German, entered into this contract in the German language with the plaintiffs, a Swedish company and a German salvage company, for the payment of a certain sum, not to the plaintiffs, but to the other salvage company, who are out of the jurisdiction and are not parties to this action. The alleged breach is the non-payment of the salvage money; but as no place of payment is specified the contract does not, either expressly or by implication, require that performance should be within the jurisdiction; the plaintiffs, therefore, cannot bring themselves within Order XI., r. 1 (*e*): *Bell & Co.* v. *Antwerp, London, and Brazil Line.* (1)

As the proceeds of the *Eider* in court are not sufficient to satisfy their claim, the plaintiffs have resorted to this remedy, which is not based on maritime lien, but on a personal contract to pay 50 per cent. of the value of the salved property as estimated by a German umpire. The plaintiffs cannot recover more than the value of the salved property: *The Dictator* (2); though it is true that the matter in question might be given in evidence if the res were sufficient, but, being insufficient, the plaintiffs are seeking to invoke the aid of the Court, not for salvage, but to enforce a special contract, which is governed by German, not English, law: *Harris* v. *Owners of Franconia* (3); *Lloyd* v. *Guibert.* (4) By German law the master of the *Eider* had no authority to bind his owners beyond the value of the ship.

The contract says that the money is to be paid within ten days after the completion of the salvage; and, primâ facie, the place of payment is the domicil of the creditor—that is, at Hamburg, where the German salvage company carry on business. The fact that that company is to have a lien upon ship and cargo until payment does not help the plaintiffs, as this lien does not localize the payment so as to carry with it the right to be paid where the res is, for the lien given by the contract is possessory, and is only a form of security against non-payment.

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(1) [1891] 1 Q. B. 103.
(2) [1892] P. 304.
(3) 2 C. P. D. 173.
(4) Law Rep. 1 Q. B. 115.

Some of the money on account of the salvage of the cargo has been paid in England; but as this was done by express authority it does not justify the contention that all the money is to be paid in this country.

To bring this case within the rule there must be an absolute obligation on the defendants to pay in this country; but the obligation is for the German debtors to pay their German creditors in Germany.

Finlay, Q.C., and *F. W. Raikes*, for the plaintiffs. The action is not founded upon the award made in Germany. This only determined the amount; the action is based upon a contract entered into in this country, by which salvage services were to be rendered in this country by the plaintiffs against a salvage reward of 50 per cent. of the value of the salved ship and her cargo, conveyed, under the terms of the contract, into an English port. It is not material for present purposes, whether the contract is governed by English or German law, or whether all the parties to it are foreigners, or whether the contract specifically states where payment is to be made. The sole question is whether, so far as payment is concerned, it was intended to be performed within the jurisdiction, for, to bring it within Order XI., r. 1 (*e*), it is sufficient if it appear, from a consideration of the terms of the contract, and of the facts existing when the contract was made, that it was so intended: *Reynolds* v. *Coleman*. (1) On rendering salvage services a lien arises by operation of law, and under the contract a lien is expressly given which in ordinary course would be released by payment at the place where the res is. Assuming that the lien given by the contract is possessory, this strengthens the position of the plaintiffs, as, until payment, the salvors are under the contract entitled to retain corporeal possession, and the Court will, therefore, draw the inference that the money is to be paid within the jurisdiction where the ship is. The salvage in respect of the cargo has in fact been paid in this country.

It is submitted that there is a cause of action—that is, a breach—within the jurisdiction—and it is not material that the other salvage company has sued the defendants in a German court, as that company only seeks to recover the half of the 50 per cent. of the value, and has left the plaintiffs free to proceed here for their own share. It is a mere accidental omission that the name of the plaintiffs is not inserted in the subsequent paragraphs as well as at the commencement of the contract. In *Fry* v. *Raggio* (1), before Coleridge, L.C.J., and Mathew, J., payment for coals delivered in Italy, at a price specified in English money, was to be made "in cash against receipt of the documents," and the Lord Chief Justice inferred from that that the money was to be paid in England. In *Rein* v. *Stein* (2) there was no express stipulation as to the place of payment; but the Court held that the plaintiff was entitled to the writ because the course of business shewed that payment would be made in England. In *Bell & Co.* v. *Antwerp, London, and Brazil Line* (3) the money was to be paid outside the jurisdiction in the country where the work was done; but in this case the salvage was performed within the territorial waters of this country, and the vessel and her cargo delivered, in accordance with the terms of the contract, in an English port, and the plaintiffs are entitled to look for payment here before parting with the possession of the ship over which a lien is given by the contract.

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(1) 36 Ch. D. 453.

Sir R. E. Webster, Q.C., in reply. *Reynolds* v. *Coleman* (4) is commented on and explained in *Bell & Co.* v. *Antwerp, London, and Brazil Line* (3), and Lord Esher, M.R., points out (5) that Cotton, L.J., did not mean to say more than that "the Court must look at the contract, and, construing it according to the ordinary rules of construction with regard to contracts, must see whether, upon the terms of the contract so construed, it appears to be one to be performed within the jurisdiction." In *Fry* v. *Raggio* (1) the learned judges differed; but both agreed that if it was intended that payment should be made in Genoa, then the writ ought not to issue. In *Rein* v. *Stein* (2) Kay, L.J., says (6): "Primâ facie in commercial transactions when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on

(1) 40 W. R. 120.
(2) [1892] 1 Q. B. 753.
(3) [1891] 1 Q. B. 103.
(4) 36 Ch. D. 453.
(5) [1891] 1 Q. B. 103, at p. 108.
(6) At p. 758.

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business." None of these cases therefore assist the plaintiffs. The only point they have made is that they have a lien, and that, in order to release that lien, payment should be made in Southampton where the res is; but the action is one at common law based upon a contract made by foreigners with foreigners to pay a sum of money ascertained by an award made abroad, and the locality of the res over which the possessory lien exists has nothing to do with the place of payment.

THE PRESIDENT (SIR FRANCIS H. JEUNE). This case is important as far as regards the amount involved; but I do not think that anything will be gained by my delaying to give judgment about it, because, although when I had the matter before me originally I thought the writ ought to issue, I did so in the belief that the money was payable in England, as the affidavit said. I find no fault with the affidavit for so saying, because that was intended, no doubt, to express in a compendious way what the contention of the plaintiffs was. I am afraid, possibly hastily, I accepted that as a fact, and on that it seemed to me that the writ ought to go. On further consideration of the matter, and looking more carefully to the contract itself, and the inference to be drawn from it, I think I cannot take that compendious statement as accurate.

The question appears to me to be a simple one, and to be a question of fact in a certain sense—that is to say, a question founded on the true construction of the contract, and the inferences to be derived from the terms of it. The matter turns upon Order XI., r. 1, sub-s. (*e*). [The learned judge read the rule, and continued :—]

That means, that where you have a contract of which part, and not necessarily all, is to be performed within the jurisdiction, and a breach within the jurisdiction has arisen by reason of that part of the contract not being performed, then the writ may issue. It is not necessary, as has been held, that the whole of the contract should be performed within the jurisdiction, but what is necessary is that there should be a breach within the jurisdiction—that is to say, a breach of part of the contract which ought to be performed within the jurisdiction.

The authorities on this appear to me to indicate very clearly what the principles are by which this rule should be construed. The leading case is that of *Bell* v. *Antwerp, London, and Brazil Line.* (1) Two propositions appear to me to be made out from the judgment of the Court of Appeal in that case. In the first place, it seems clear that it must be shewn that the part of the contract of which the breach is complained must be performed—not may, but must, be performed—within the jurisdiction; and, secondly, I gather from the judgment of Kay, L.J., that to arrive at this you must look at the words of the contract, taken in connection with the surrounding circumstances. That, I think, is not inconsistent with any of the other cases which have been referred to.

On the contrary, the other cases appear to me to illustrate the principles laid down in that case. *Reynolds* v. *Coleman* (2) is dealt with in that to which I have just referred, and there it is obvious that the basis of the judgment is that the breach complained of was a breach of something which not only was to be done in England, but which could not be done anywhere else. Therefore, it is clear there was a breach within the jurisdiction. *Fry* v. *Raggio* (3) turned upon the inference to be drawn from all the circumstances of the case, and the two learned judges who heard that case differed in their view as to the inference, one holding that certain facts, such as the provision that the payment was to be made in English money, shewed that the payment was to be in England. The other learned judge came to a contrary conclusion, based chiefly on the fact that in his view it was to be paid against documents, and those documents were to be handed over in Italy. The difference arose from the difference of views as to the facts of the case. But, as has been pointed out, that does not affect the principle that both learned judges held that the question was where the money was to be paid.

Rein v. *Stein* (4) further illustrates the proposition that, in coming to the conclusion where the breach has taken place, you must look at all the circumstances. In that case the Court were

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(1) [1891] 1 Q. B. 103.

(2) 36 Ch. D. 453.

(3) 40 W. R. 120.

(4) [1892] 1 Q. B. 753.

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chiefly influenced by the considerations, I think, arising from the course of conduct between the parties, so that what one has to do is to see, in the terms of the contract and on the inferences to be drawn from the terms themselves and the surrounding circumstances at the time of the making of the contract, what it was that was to be done, the breach for not doing which is complained of.

The most important fact for consideration in the present case is the provision as to whom this money is to be paid. Under the terms of the contract it has to be paid to a German company domiciled in Hamburg, and having no place of business elsewhere. It is quite true that it is suggested that that does not accurately express the intention of the parties, and that it was through a slip in the contract that the terms were not so expressed that the money should be paid to the plaintiffs as well as to the Hamburg company. I do not know that that would have made any difference, as the plaintiffs are a Stockholm company. But I do not think I can adopt that view, because the contract is express; and it seems to me to be reasonable in its terms. I cannot accept the view that a mistake has been made. It appears to me to be clear that the terms of the contract are that the money is to be paid to the Hamburg company, though possibly to be distributed afterwards. If that is so, where was it to be paid? Why, surely, in Hamburg. It is a general principle that money is paid to a creditor by a debtor where the creditor is. That principle has been illustrated in the well-known case of *Robey* v. *Snaefell Mining Co.* (1), relating to the delivery of machinery in the Isle of Man, where, although the delivery was to be in the Isle of Man, still, as the plaintiffs resided in Lincoln, it was held that the money was to be paid here in England. That is the strongest fact I have to deal with in this case. It is said there were other parts of the contract itself which would lead to the contrary inference. It is said that the money is to be paid against the delivery up of the ship over which a lien was to extend. I do not think that ought to be carried so far as to say that it meant that money was to be paid where the ship, at the time of the conclusion of the salvage

(1) 20 Q. B. D. 152.

services, happened to be. I think the contract means that there was to be a lien of a possessory nature; but I do not think it follows from that that the money is to be paid where the res at the time happens to be. No authority has been cited to me for this purpose, and I am not sure whether those first principles which have been alluded to would naturally point to that conclusion.

Is anything to be drawn from the surrounding circumstances, or from the terms of the contract, which would lead one to a different conclusion? I do not think there is. It is said that the award may make some difference. I do not think it does, because it appears to me this action is brought, not upon the award, but upon the contract. Even if it were on the award, the award is made in Germany by a German, and deposited in a German Court.

Then it is suggested that part of the money has been paid in London. But the answer to that appears to be that that took place by express authority, and, be it observed, by the express authority of the Hamburg company, shewing, as one would have expected under the terms of the contract, that they were the persons who alone had power to authorize the application of the money, and to determine, if they chose, where in any particular case it was to be paid. Certainly, when one looks at the general course of the case, when you find that it is a contract between three parties, two of them Germans and one a Swede, a contract governed by German law, although it related to subject-matter which happened to be in English waters, the presumption, I think, would rather be that the contract would provide that payment should be made to one or the other of these parties abroad, rather than in this country.

It appears to me, therefore, on the whole, that there is no ground, either on the terms of the contract, or surrounding circumstances, for saying that this payment of money must take place in England, but that it was intended that the payment should take place in Germany. I am obliged, therefore, to hold that this writ ought not to be allowed to issue, as it does not fall within the provisions of the order relied upon.

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On appeal:—

Finlay, Q.C., and *F. W. Raikes*, for the appellants (plaintiffs).

Sir R. E. Webster, Q.C., *English Harrison*, and *Butler Aspinall*, for the respondents (defendants).

The arguments were the same as in the Court below, and, in addition to the cases there cited, the plaintiffs referred, on the question of the effect of the lien, to *Chase* v. *Westmore*. (1)

LORD ESHER, M.R. In this case the plaintiffs, who are foreigners, have brought an action in an English Court, that is to say, they issued a writ in an English Court in order to enforce, as they say, a contract. At the present time the proposed defendants are resident abroad, and the writ, therefore, cannot be served without the leave of the Court. The leave of the Court is asked for, and whether the Court can or cannot give that leave depends upon the construction of Order XI.

The breach complained of here is the non-payment of money according to the contract. Therefore the question must depend upon what is the true construction and application to this case of Order XI., r. 1, sub-s. (*e*). That provides that the Court may give leave to serve the writ abroad, where the action is founded on a breach within the jurisdiction of a contract, wherever made, where that which is said to be a breach ought to be performed within the jurisdiction. It signifies not where the contract was made. We have so to construe it, as Cotton, L.J., said in *Reynolds* v. *Coleman* (2), as to see whether, within the true meaning of the rule, the payment here according to the terms of the contract ought to be performed within the jurisdiction.

The contract was made between the captain of a German ship which was on the rocks within the realm of England; that is, within the three-mile limit. It was made by the German captain of a ship in respect of that ship, and her condition at the time when the contract was made, and with foreigners in respect of work to be performed by those foreigners with regard to the ship. The contract is not only made with such persons with regard to such a

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(1) 5 M. & S. 180.

(2) 36 Ch. D. 453.

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subject-matter, but it is a contract drawn up in the German language. It seems to me that that makes it a German contract, and a contract made by foreigners, under the jurisdiction of the German flag; not that that is altogether material, because, according to this rule, the contract may be made anywhere. Therefore, if the contract be taken to be made in England, the question comes to be the same; but for the purpose of considering the contract, I should say it is a German contract.

The parties to that contract are now abroad, and neither the plaintiffs nor defendants are now in England. The contract is to perform work to that ship; whether it be called salvage work or not, seems to be immaterial. It is for work to be done to that ship, and payment is to be made for that work. There is no place specified in the contract for the payment. What, then, is the ordinary rule? That the debtor must follow his creditor, and must pay where his creditor is. If this were a contract made in England, by two people who were at the time in England, and payment was to be made in England, nevertheless, if the creditor went abroad and was abroad at the time payment was to be made, the debtor need not go after his creditor to pay him abroad; he may wait till his creditor comes back to England. The case of *Fessard* v. *Mugnier* (1) shews that absence of the creditor from England affords an excuse for the want of tender or payment by the debtor where the creditor has gone abroad after the making of the contract, but nevertheless the proper place of payment is determined by the rule that the debtor must follow the creditor, and if he makes a bargain with a person who is abroad at the time when the contract is made, which is the case here—and what makes this case stronger is, that it is made by a foreigner who is abroad, with a foreigner who is also abroad—the place of payment according to the contract follows the general rule, and is to be made where the creditor is.

But it is said that there is a possessory lien here. Now, what is the effect of lien on a contract, where there is a contract besides the lien for payment? The lien is an additional security given to the person who has to be paid; but he has a right to be paid besides and independently of his lien. Therefore, the existence

(1) 18 C. B. (N.S.) 286.

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of the lien does not alter the obligation to pay. If the person who is obliged to pay pays, the right of the lien does not apply. It is only after the breach of the obligation to pay that the lien attaches. It seems to me that the existence of the lien—whatever rights as to lien, and as to tender in respect of that lien to get rid of it, which that lien gives—does not in the least affect the obligation to pay, which is independent.

Here, therefore, the obligation to pay, which is the breach relied on, was an obligation to pay abroad, so that even if a tender might have been made in England, and even if, which I do not accept, the person who was in possession of the lien here could accept payment as well as accept tender, it makes no difference.

This case must be decided as if there was no right of lien at all, and upon the obligation of the contract. If that argument as to the right to pay the person who is in possession of the thing exists, and if payment to him would be a good payment, it then only comes to this, that there may be in this case a good payment in England.

But then the question arises, that there may be a payment abroad. It is more than that. The right payment is abroad, and if it was the case that the payment might be made in either one of the two cases, then the case of *Bell* v. *Antwerp, London, and Brazil Line* (1) comes in, and you have the case of a payment which may be made in either one of the two places, that is abroad or in England, and if that is so then the case is not within the rule.

Then it is not a case in which the contract for payment, the breach of which is complained of, is one that is to be performed within the jurisdiction. It is one which may be performed within the jurisdiction or out, and then that case holds, that it is not within this Order XI., r. 1, sub-s. (*e*).

Looking at this case, therefore, in any point of view, it is not a case within the sub-section, and therefore the refusal by the President of the Admiralty Division to allow the writ, or notice of the writ, to be served was right, and the appeal must be dismissed.

(1) [1891] 1 Q. B. 103.

LINDLEY, L.J. I am entirely of the same opinion. The question comes to a very short point, whether those who seek leave to serve this writ abroad can make out that the contract, for a breach of which they are suing, is one which, according to the terms of it, ought to be performed within the jurisdiction. If they cannot make that out, they are not entitled to obtain leave to issue this writ.

The expression "according to the terms thereof" has been explained more than once. It means more than according to the actual words. According to Cotton, L.J., in *Reynolds* v. *Coleman* (1), you are entitled to look into the circumstances under which the contract was entered into. You may look at the surrounding circumstances, and Kay, L.J., in the later case of *Rein* v. *Stein* (2), refers to the dealings between the parties. The question is whether there is any obligation on the defendants to pay this particular sum in this country. We must look to the contract, to the parties to it, and to the circumstances in which it was entered into.

The contract is between three foreigners. It is between the Neptun Salvage Company, which is the company asking for leave. It is a Swedish company. Another party is a German company, the Nordischer Bergungs-Verein. It has no place of business here at all. It is at Hamburg. The third of the parties, and the one which is sued, is a German company, the owners of the *Eider*, having no agent, and no place of business here.

The contract itself relates to the salvage of a German ship called the *Eider*, which was ashore on the coast of the Isle of Wight last summer. The contract is in the German language. In substance it was, that the two salving companies would do the best they could to get the vessel off the rocks and take her to Southampton, and they were to be paid 50 per cent. of her value when salved ten days after the salvage. Nothing is said as to the place of payment, or as to the currency in which payment was to be made. Payment was not to be made to the Neptun Company, though they were to share 50 per cent. of the amount paid to the Nordischer Bergungs-Verein.

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(1) 36 Ch. D. 453, at p. 464.

(2) [1892] 1 Q. B. 753, at p. 759.

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The contract was so worded and so framed as to confine the obligation to pay to the German company. Whether that was a blunder we need not speculate. This is not an action for rectifying a blunder, and the contract is as before us. Where is the obligation to pay to be performed? The services were to be performed in English waters, and the vessel was to be taken to Southampton; but the contract is wholly silent as to where payment is to be made. Can this question be solved by any of those principles of law by which lawyers are guided? The answer is, "Yes." The person to pay is a German company; the person to whom payment is to be made is a German company; and the obligation to pay is to be performed in Germany. It appears to me that this conclusion is too plain for reasonable argument to the contrary.

But it is said that the lien clause makes a difference, and that by reason of the stipulation that the salvors are to have a lien the obligation as to the place of payment is changed. Is it? It is nothing more than a stipulation that the salvors shall not be compelled to part with the ship till they get payment. It does not affect the obligation to pay or the place where the obligation is to be performed. The whole of this argument about lien is based on a misconception respecting the legal operation of tender. Tender does not discharge a debt. The obligation to pay is not discharged or extinguished by a tender. The mere fact that the lien might be discharged by tender does not shew that the place of performance is changed. That appears to me to be the short answer to this case. I think that the case is plain, that the judge was right, and that the appeal should be dismissed.

Bowen, L.J. I am of the same opinion. We were asked in the first place to construe this contract as if the payment was to be made not merely to the Bergungs-Verein, but also to the Neptun Company, and to do violence to the language as expressed in that respect by reading into the contract words which have been either omitted on purpose or omitted by accident. It has been already pointed out that we cannot do that. This is not an action for rectification of contract. We must, therefore, take the contract as it stands, and construe it according to its plain language, according to which the agreement made with the plaintiff company is not one for payment to them direct, but for payment through the Bergungs-Verein. But it is alleged that there has been a breach of agreement to pay through the Bergungs-Verein. I do not doubt but that that would be a breach of contract for which an action might lie, if there was jurisdiction in this country.

That leads us to the further question, whether there has been here within the meaning of the rule a breach within the jurisdiction—in other words, according to the language of the rule, whether the contract provides, according to the terms thereof, that the performance shall take place in England.

It seems to me that what goes to the root of the whole of this discussion is the doctrine laid down in *Bell & Co.* v. *Antwerp, London, and Brazil Line* (1), that it will not do to shew that the performance ought to be made in England or abroad, but that the only cases that come within the rule are where the performance ought to be in England. To my mind, the appellants fail to shew that the performance ought to be in England. That must be a question of the construction of the contract. Is this a German or an English contract? Beyond all question, it seems to be a German contract. It is made in the German tongue, though I do not say that that is decisive, between the Bergungs-Verein, who have no place of business in England, but had only an agent at the time; between the Neptun Company, who appear to have a sort of place of business in England, but really are a Scandinavian firm carrying on business at Stockholm; and the captain of the defendants' ship.

It was a salvage agreement made by the captain of the ship at the place where the vessel was. Now, is that primâ facie a German contract? There is no provision that the payment of the salvage money is to be made in England, and none as to where the money is to be paid. Having such a German contract between two foreign firms, one of which, to which payment is to be made, living in Hamburg, and the third party, being also Germans, living in Bremen, is it really reasonable to suppose

(1) [1891] 1 Q. B. 103.

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that they intended to propose that payment should be made in England? Unless for the mere fact that the salvage service was being performed in England, or that lien was given for the salvage, the matter appears too clear for argument. Two German firms might be living next door. A salvage service is performed at the other end of the world, and it is suggested that the contract made between the captain of the ship and the representative of the other German firm is a contract according to which payment ought not to be made by one German firm seeking the other living next door by sending the money across the street. I do not think it possible to say that. If it was not for the suggestion as to lien, such a view could not be maintained.

But, as to the lien, the whole of the argument, as has been pointed out, is really based on a transparent fallacy. The right of a creditor is a general right. His debtor is bound to seek him and find him wherever he is. Primâ facie, it is a general obligation. But salvage results in placing in the possession of one of the contracting parties the salved property, which is the subject-matter of the action, and they have a lien.

It is suggested that, because the owner of the ship may have a right to tender in England, and get the lien discharged, that shews that his obligation to pay is not a general obligation to pay his creditor, wherever he can find him, and that the place of payment is localized, but the tender does not discharge the debt. It may operate to discharge the lien, but it does not discharge the debt, and no English lawyer who is accustomed to plead in these Courts can for a moment suppose that it does. The defendants were not bound to tender. They were not bound to pay in England because they might have tendered in England, and because they had a right to have the lien discharged. I will assume that the lien could properly be discharged by a tender here in England. As to that, I say if you mean to decide that point, it would be a different point from the one which arises in this case. It is sufficient to say that if there was a right to tender he was not obliged to tender, and still less obliged to pay here.

The general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor. In *Haldane* v. *Johnson* (1) it was held that a covenant for payment of rent, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money. In the judgment, in that case, the conclusion, to the same effect, arrived at, on the authorities, by Parke, B., in *Poole* v. *Tumbridge* (2), is relied upon. Most of the cases are collected in *Fessard* v. *Mugnier* (3), which is very instructive on this subject.

It is not necessary to hold that this contract to pay might not be discharged by payment elsewhere than where the creditor is. If the payment was received in England, no doubt there would have been a discharge of the debt. The question, however, is, Where is the obligation to pay? Even though it might be performed in England, still, if it had to be performed abroad it does not come within the rule. For these reasons, it seems to me clear that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Sons, Coward, & Hawksley.*
Solicitors for defendants: *Clarkson, Greenwells, & Co.*

T. L. M.

[IN THE CONSISTORY COURT OF ROCHESTER.]

1893
Feb. 21.

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF ROCHESTER *v.* HARRIS.

Ecclesiastical Law—Jurisdiction—The Clergy Discipline Act, 1892 (55 *&* 56 *Vict.* c. 32), ss. 2, 12—*Complaint against Clergyman for Immorality—Offence of occasioning Scandal by Immoral Conduct not justiciable by Chancellor of Diocese sitting with elected Assessors—Amendment of Complaint—Charge of Habitual Drunkenness—Practice.*

The complaint in a criminal suit tried before the Chancellor of the Diocese of Rochester sitting with assessors, under the Clergy Discipline Act, 1892, after charging the defendant, a clergyman holding preferment within the diocese of Rochester, with certain specified offences against morality, further charged him with "occasioning grave scandal and offence in the parish of which he was incumbent by his scandalous conduct in the several preceding charges set forth" :—

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(1) 8 Ex. 689. (2) 2 M. & W. 223. (3) 18 C. B. (N.S.) 286.

Held, that the ecclesiastical offence of "occasioning scandal and evil report" was not an offence which could be legally tried under the Clergy Discipline Act, 1892, and that all reference to any such charge must be struck out of the complaint.

Practice of the Consistory Court of Rochester as to admitting to proof in a criminal suit charges of habitual drunkenness and of acts of drunkenness, the precise dates of which the prosecutor cannot specify.

In this cause of office, the defendant, the Rev. Alfred Edward Ormonde Harris, vicar of the parish of Stoke, Kent, and diocese of Rochester, was prosecuted in this Court by the Bishop of Rochester, according to the prescribed procedure (1), under the Church Discipline Act, 1892.

The complaint lodged in the registry of the diocese was dated January 5 last, and contained seven charges. Of these the first four charged the defendant with being intoxicated on certain specified days within five years of the making of the complaint whilst officiating at the morning and afternoon services and at funerals at Stoke Church (2), and in consequence conducting himself in an irreverent and improper manner; whilst the 5th charge alleged against him similar acts of drunkenness and irreverent and improper conduct on occasions within the five years, the precise dates of which the prosecutor was unable to specify; and the 6th charge was one of habitually indulging to excess in intoxicating liquors, and being in a state of drunkenness.

The 7th charge was in terms as follows: "Occasioning grave scandal and offence in the parish of Stoke by the scandalous conduct in the several preceding charges set forth."

The defendant filed an answer denying all the charges comprised in the complaint.

Feb. 20, 21. The case came on for trial before the chancellor of the diocese of Rochester (Lewis T. Dibdin, Esq.), sitting with the following five assessors, the Venerable Archdeacon Burney, the Hon. and Rev. Canon Pelham, the Rev. G. S. Streatfield, J. G. Talbot, Esq., M.P., and T. H. Baker, Esq., J.P. (1).

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(1) See Rules of Court under the Clergy Discipline Act, 1892.

(2) The first charge charged the defendant with being intoxicated at the afternoon service at Stoke Church on Sunday, October 12, 1890, and the dates specified in the second, third, and fourth charges were March 1, September 25, and November 1 respectively—all in the year 1892.

On the case being called on, the solicitor for the defendant applied to the Court to amend the complaint by striking out the 7th charge therein on the ground that the Ordinary sitting with assessors under the procedure prescribed by the Clergy Discipline Act, 1892, could not entertain such charge, the offence charged in it not being one of the offences specified or alluded to in either the Clergy Discipline Act, 1892, ss. 2, 12 (2), or the 75th or 109th canons of 1603 (3).

(1) The Court sat in St. Mary's Chapel in Rochester Cathedral.

(2) The Clergy Discipline Act, 1892, ss. 2, 12, provides as follows:—"2. If a clergyman either is convicted by a temporal court of having committed an act constituting an ecclesiastical offence, and the foregoing section does not apply to him, or is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and being a question of doctrine or ritual, he may be prosecuted .... by the bishop of the diocese .... and tried in the consistory court of the diocese in which he holds preferment, and may be so prosecuted and tried in accordance with the prescribed procedure, subject as follows":—[Here follow provisions as to the disallowance by the bishop of the diocese of vague and frivolous complaints, as to requiring in certain cases security for costs, as to five elective assessors being members of the Court for deciding questions of fact in certain cases either party to the case so requiring, as to retrials, and as to the chancellor of the diocese presiding and alone determining questions of law and costs.]

"12..... The expressions "immoral act," "immoral conduct," and "immoral habit," shall include such acts, conduct, and habits, as are proscribed by the seventy-fifth and one hundred and ninth canons issued by the Convocation of the Province of Canterbury in the year one thousand six hundred and three."

(3) The 75th and 109th canons of 1603 are as follows:—

Canon 75: "*Sober Conversation required in Ministers.*—No ecclesiastical person shall at any time other than for their honest necessities, resort to any taverns or alehouses, neither shall they board or lodge at any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night playing at dice, cards, or tables, or any unlawful game; but at all times convenient they shall hear or read somewhat of the holy scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God; having always in mind that they ought to excell all others in purity of life, and should be examples to the people to live well and christianly under pain of ecclesiastical censures to be inflicted with

[He also contended that the 5th and 6th charges were so vague and undefined that they ought not to be admitted to proof.]

A. B. Kempe, for the Bishop of Rochester, contrà. The offence set forth in the 7th charge, that is the offence of creating scandal or evil report by the misdoing there complained of, has always been an offence against the laws ecclesiastical and within the jurisdiction of the Ecclesiastical Courts (1), and this Court has now acquired power to entertain it by virtue of the 2nd and 12th sections of the Clergy Discipline Act, 1892. The latter of these two sections defines the "immoral" acts, conduct, or habit which, by the former section, the Court is enabled to take cognizance of as including the acts, conduct, and habit proscribed by the 75th canon. Now, the act of "offending the brethren" by such conduct as the defendant is charged with is in terms proscribed by this canon; and what is the offence so proscribed but the offence of "scandal" as charged in the 7th charge? That the offence in question is within the purview of the Act of 1892 is also shewn by the provisions of s. 6 of that Act, enacting, that in considering the sentences passed thereunder, regard is to be had to the interests of the parish; and surely the Court, in order to inform itself as to these interests, ought to have evidence before it of the effect which the defendant's conduct has had on the parishioners—that is, of the scandal the defendant's conduct has created. If the offence of "scandal" is not within the Act of 1892, it would be necessary in order to have all the charges in the complaint adjudicated on, that in addition to this prosecution, separate proceedings under the Clergy Discipline Act, 1840, should be taken against the defendant in respect of the scandal.

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severity according to the qualities of their offences."

Canon 109: "*Notorious Crimes and Scandals to be certified unto Ecclesiastical Courts by presentment.*—If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and [vel] any other uncleanness, and wickedness of life, the church-wardens, or quest-men, and side-men, in their next presentments to the ordinaries, shall faithfully present all and every of the said offenders, to the intent that they and every of them may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion till they be reformed."

(1) See *Borough* v. *Collins*, 15 P. D. 81.

Such a result could never have been intended by the legislature. Sect. 10 of the Act of 1892 has given the Court full powers as to conclusively deciding, subject to appeal, what offences are within the Act. As to charges 5 and 6, they are clearly admissible in their present form: *Burder* v. *Speer*. (1)

THE CHANCELLOR. As regards the 5th and 6th charges, it is quite clear that before the passing of the Clergy Discipline Act, 1892, habitual or frequent drunkenness was an ecclesiastical offence and could be charged as such, and that, if the promoter was unable to give the dates of the alleged acts of intoxication, he need not do so. The point arose in *Burder* v. *Speer* (2), the decision in which was affirmed by the Judicial Committee of the Privy Council. (3) In that case Sir H. Jenner, sitting in the Court of Arches, said (4): "The great objection raised to the admissibility of the articles was, that they were laid so generally that it was impossible for the party to defend himself against the charges, and the Court did, when admitting the articles, express some hesitation, or rather threw out a suggestion, that it was desirable, if possible, that they should be more specific as to time and place. But the answer was that when you plead habit and custom, it is almost impossible to specify the particular time and place, when and where any particular acts took place, so as to be tied down to give proof of them." This is a decision binding on me, and applicable to the present case; for in prosecutions under the Clergy Discipline Act, 1892, the former practice and procedure, except as expressly altered, is preserved. (5) I hold, therefore, that the 5th and 6th charges are charges which the Court can entertain. The question remains whether the Court has any jurisdiction to take cognizance of the 7th charge. There is no doubt that an existing scandal of a clergyman having offended against the ecclesiastical law is in itself a sufficient cause for proceedings under the Clergy Discipline Act, 1840, in the spiritual

(1) 1 Notes of Cases, 39; 3 Moo. P. C. C. 166. See *Marriner* v. *The Bishop of Bath and Wells*, Dec. 2, 1876, Arches Court, *post*, p. 145.

(2) 1 Notes of Cases, 39.

(3) *Nomine Speer* v. *Burder*, 3 Moo. P. C. C. 166.

(4) *Burder* v. *Speer*, 1 Notes of Cases, 51.

(5) See Clergy Discipline Act, 1892, Rules [1892] par. 96.

Court, for the censure of the clergyman against whom the scandal exists. But the question is whether such a scandal is cognizable under the Clergy Discipline Act, 1892, which provides a special method of procedure in certain cases. I am of opinion that it is not. The 2nd section of the Act of 1892 is applicable to a clergyman "alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality, and not being a question of doctrine or ritual." The corresponding words of the Clergy Discipline Act, 1840, were (s. 3) a clergyman "charged with any offence against the laws ecclesiastical *or concerning whom there may exist scandal or evil report as having offended against the said laws.*" The last words made the offence of scandal cognizable under the Act of 1840, as it had been cognizable before under the general ecclesiastical law; but these words are omitted from the Act of 1892, and there are no similar or equivalent words. The legislature apparently intended to provide a special statutory machinery for dealing with actual offences against morality and nothing else: and accordingly the words "immoral" and "against morality" occur four times in that portion of the 2nd section I have read. In the 12th section of the Act there is a much-needed definition of "immoral." "The expressions 'immoral act,' 'immoral conduct,' and 'immoral habit,' shall include such acts, conduct, and habits as are proscribed" by the 75th and 109th canons of 1603. The 109th canon is entitled "Notorious crimes and scandals to be certified unto Ecclesiastical Courts by presentment," and provides as follows: [The learned Chancellor read the canon in question, and continued:—] Now, what are the offences "proscribed" by this canon. To proscribe means to condemn capitally. Strictly speaking, nothing is condemned by the canon. It merely provides that certain offences are to be reported to the authorities with a view to some subsequent proceedings. But I suppose we ought to read the section as if "described" or "mentioned" had been substituted for "proscribed." The intention is to make the offences mentioned in the canon matters cognizable under the Act as immoral acts, habits, and conduct. It may be argued that the offences mentioned in the Act are not "adultery, whoredom, incest," &c., but "offending the brethren" by these acts, and, therefore, that it is scandal of misdoing rather than misdoing itself which is the offence described. But I do not think that is the fair way to read the section and the canon together, especially having regard to the exclusion of the words as to scandal contained in the Act of 1840, to which I have already drawn attention. I think the meaning of the reference to the canon is that "adultery, whoredom, incest," and the other offences enumerated are to be included in the category of immoral acts, habits, and conduct cognizable under the Act. It is very difficult to say that scandal, which may be unjust or caused by mere indiscretion on the part of a clergyman, is nevertheless "an offence against morality," or "immoral conduct." This is a highly penal statute, and I am not disposed to strain its language so as to include cases not, in my opinion, intended to come within it. Mr. Kempe argued that I might entertain the charge grounded on scandal because of the 10th section, sub-s. 4, of the Act, which is as follows: "The judgment of a Consistory Court . . . . that a clergyman has been guilty of an immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not a question of doctrine or ritual, shall be conclusive that the offence charged is cognizable by a Consistory Court under this Act." But I think the existence of this remarkable clause, which seems to provide that the mere assertion of jurisdiction is to give it, throws upon the Court an extra responsibility to keep strictly within the letter of the Act of Parliament. The Court must be on its guard against possible injustice to the accused, as well as against usurpation, on its own part, of powers never intended to be conferred.

It was further argued that I ought to admit evidence of scandal because, if the defendant is found guilty, then, under s. 6 (1) (*a*), in considering what sentence is to be passed, "regard is to be had to the interests of the parish;" and that without such evidence the Court has no information as to the interests of the parish. I do not see anything in the Act or rules to support this argument, and I do not know how a judge is to put himself in a position to judge of the interests of the parish, except by

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The Chancellor.

using his common sense upon the evidence properly before him. I cannot suppose that on the issue, e.g., Was the defendant drunk on a certain date? the Court is at liberty to admit evidence of the general gossip in the parish, in order that if the defendant is found guilty the Court may be able to pass an adequate sentence. But this argument is really beside the mark, for the question is not whether evidence of scandal can be admitted on the other charges, but whether scandal as a specific charge can be entertained. I think not. The 7th charge as to scandal must therefore be struck out.

The complaint having been amended in accordance with this judgment by striking out the 7th charge therein, the trial was proceeded with on the remaining charges, and, witnesses having been examined on behalf of the prosecutor and of the defendant, the defendant was, on the 21st of February last, adjudged guilty of the offences charged in the 2nd, 3rd, 4th, and 5th charges of the complaint, and condemned in the costs of the suit other than the costs of and incident to the 7th charge, which costs the Chancellor directed should be paid by the prosecutor. The case was thereupon adjourned in order that a notification of the defendant having been found guilty and of what sentence should be passed might be made to the bishop of the diocese, and on a subsequent day the Bishop of Rochester pronounced a sentence of deprivation in the suit, depriving the defendant of all his ecclesiastical promotions within the diocese of Rochester.

Solicitors for prosecutor: *Lee, Bolton, & Lee.*
Solicitor for defendant: *Hayward.*

C. F. J.

1876

MARRINER v. BISHOP OF BATH AND WELLS.

Dec. 2, 1876.

[In the Arches Court of Canterbury.]

MARRINER *v.* THE BISHOP OF BATH AND WELLS.

This was a suit of duplex querela, in which the promovent, the Rev. John Stuart Marriner, claimed to be instituted to the Vicarage of Marston Magna, in the county of Somerset. The Bishop of Bath and Wells had refused to institute the promovent, on the grounds (inter alia) that the promovent had been guilty of drunkenness, and having appeared to the monition, gave in a responsive allegation, the 5th paragraph of which, as amended before any application to the Court to admit the same, was in substance as follows:—

"5. Previously to the matters stated in the 2nd article hereof, to wit, during the promovent's incumbency of Silsden aforesaid, he was repeatedly intoxicated in or near his house at Silsden aforesaid, and elsewhere in the said parish, and was so seen by Samuel Tillotson, the sexton of the said parish, and others on the occasions following—that is to say, he was intoxicated previous to and while conducting divine service on a Sunday afternoon between twelve and eighteen months before September 14, 1873 (but when exactly the defendant cannot better specify). . . . [The responsive plea then set out a description of the alleged conduct of the promovent on the occasion in question, and continued] and on an occasion when the said Aaron John Humphreys was conducting a night-school (but when exactly the defendant cannot better specify) between seven and eight o'clock in the evening, he was found by the said A. J. Humphreys, leaning against the wall of the school drunk . . . . [a description of what was alleged to have occurred followed.] And on an occasion in the morning about six months before September 14, 1873, when he was seen by the said S. Tillotson so intoxicated, and sitting in the kitchen clothed only in his night-shirt. And on the afternoon of February 6 or 7, being a day on which he was conducting a funeral, he was intoxicated, and was so seen by John Gowthorpe, a police constable." [The paragraph then set out two occasions, the precise dates of which were given, when the promovent was alleged to have been intoxicated.]

The promovent objected to the admission of the responsive allegation: the grounds of objection to the same, so far as material to this report, being that the 1st paragraph of article 5 should be limited to the charges of intoxication, afterwards specified or should be reformed, by specifying any other particular charges intended to be relied upon, and that the responsive plea should state the hour and place where the promovent was seen intoxicated on February 6 or 7.

Dr. Tristram, on behalf of the promovent, now moved the Dean of Arches (the Right Hon. Lord Penzance), to reject the above amended responsive allegation. [He referred to *Bennett* v. *Bonaker* (3 Hagg. Ecc. 25).]

W. G. F. Phillimore, for the defendant.

LORD PENZANCE. I think really there is no difficulty about this matter. As regards staleness of charge, I think the provision of the Church Discipline Act, 1840, which provides that a clergyman shall not be prosecuted criminally

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for certain offences unless they happened within a certain limited time, is quite a separate and different matter from that which we have been investigating here. Here the clergyman is applying to the bishop to be instituted, and the bishop has the right, and not only the right, but it is a most imperative duty, to see that the man who offers himself for institution is a man of good moral character, and, upon making inquiries, he finds that within a certain period, the fact not being denied, the clergyman was obliged to give up his benefice upon a charge of drunkenness. That was enough to put the Bishop on inquiry. I think it was a legitimate matter of inquiry, and it is quite within the range of that inquiry to ascertain whether within one, two, three, or four years of that time the same thing had happened, because, if intoxication is a casual occurrence due to particular causes, however grave an offence it is in a clergyman, it might perhaps be looked over and pardoned, particularly after a lapse of years; but habitual intoxication is a different matter, and I think the bishop would be bound to ascertain whether this was a casual occurrence standing by itself, or whether, really, it was habitual on the part of the clergyman applying to be instituted. Then it was urged that it is not fair to require of a man a certificate of his conduct for more than three years. That is a different matter altogether. It is one thing to fix a period over which you will ask for certificates, and if they are satisfactory you will be content to stop there, and quite another thing when you are put upon inquiry as to misconduct, to stop that inquiry and limit yourself to a particular period. It seems to me there is no analogy between those matters. Therefore, I think there is nothing in the objection that these charges are what has been called " stale " charges.

Then comes the question of particularity. It is a very old question, and one which always arises in these suits, and it always comes to this—that the Court will require of him who makes a charge, that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place. But we all know the infirmity of human memory. We know very well that a thing may be perfectly true, though the man who deposes to it cannot tell you the day, the month, nor even the year in which it happened.

Therefore, we must make provision for that state of things, and we must allow a charge stated in these general terms to stand good, provided it is coupled with an affidavit that the party cannot give any better or more precise particulars; but when the case comes to be heard, and when the Court hears what the witness has to say, if it finds that more particulars could have been given, then, in order to do justice, it would adjourn the case to enable the incriminated person to meet the charge by bringing evidence as to the particular occasion on which evidence has been adduced. I think that is the only practicable way of dealing with this matter.

There are two charges that require more particularity; but with regard to the others, "The 6th or the 7th of February"—"in the afternoon," "being a day on which he conducted a funeral," are abundantly particular. So with respect to the next, "On the 10th of September"—that is particular enough. But then there are the charges to which I have before alluded; the first one taking a range of six months—"from twelve to eighteen months before Sept.

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14th, 1873"—as to that I should require an affidavit; and particularly I should require an affidavit as to the next, because no time at all is given.

Phillimore. The allegation will be either admitted upon that affidavit being brought in, or upon the reformation of the articles objected to—by giving the particulars of those two charges.

LORD PENZANCE. Yes; on reforming the pleas by those particulars, or if not reformed, let it be accompanied by an affidavit.

[The suit was subsequently heard on the merits; and on May 5, 1877, the Dean of Arches decreed that the defendant had shewn good and sufficient cause for having refused to institute the promovent to the vicarage of Marston Magna, dismissed the defendant from the monition, &c., and condemned the promovent in costs. From the minutes of the Court of Arches in the suit, and the papers printed for the purpose of an unsuccessful appeal asserted by the promovent against this decree, it appears that the amended responsive allegation, with certain fresh amendments, was filed on December 30, 1876, and that affidavits of particulars made by the solicitor for the defendant, and by the defendant, were filed on the same day, and on January 8, 1877, respectively.]

Proctor for promovent: *Brooks.*
Proctors for defendant: *Moore & Currey.*

C. F. J.

THE SPREE.

1893
Feb. 7, 14.

Admiralty—Salvage—Apportionment—Classification of Salvors—Non-navigating portion of Crew—Surgeon, Stewards, &c.

A large steamer fell in, in the Atlantic, with another large steamer, disabled by the breaking of her propeller shaft, and successfully brought her into port, after a towage of 757 miles, lasting five days.

The owners of the disabled steamer settled the claim of the salving steamer by the payment of 12,000*l.*, and the owners, master, and crew of the salving steamer applied to the Court to apportion this sum.

Of the fifty-nine persons, composing the crew of the salving steamer, there were eleven non-navigating members, viz., the surgeon, four stewards, stewardess, two cooks, baker, and two cabin boys, who took no active part in rendering assistance to the disabled steamer.

In apportioning the above sum, and awarding 9200*l.* to the owners, 800*l.* to the master, and the remaining 2000*l.* to the crew according to their rating, the Court:—

Held, that the non-navigating members of the crew above specified were only entitled to a half-share according to their ratings.

MOTION on behalf of the owners, master, and crew of the steamship *Lake Huron* for apportionment of salvage.

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The facts—so far as material on the question of the share to be taken by persons on the ship's books of the non-navigating class—were shortly as follows:—

The iron screw steamer *Lake Huron*—of 2576 tons nett, and 4040 tons gross, register, with engines of 500 horse-power nominal working up to 2700 actual, classed 100 A 1, of the value of 60,000*l.*, cargo (in part perishable) 30,000*l.*, freight at risk 4000*l.*, total 94,000*l.*, and belonging to the Canada Shipping Company's Beaver line of steamers trading between Liverpool and the St. Lawrence—was on a voyage from Montreal to Liverpool, with a crew of fifty-nine hands and thirty-three passengers, when, about 3 A.M. on November 28, 1892, she fell in with the North German Lloyd's steamship *Spree* of 3769 tons nett, and 6963 tons gross, register, from Bremen to New York with about 500 passengers, a large crew, mails and a general cargo. Her propeller shaft was broken, and she had made so much water in the two after-compartments that she was much down by the stern.

There was, at the time, a strong breeze from the N.W. with a high confused sea, but the *Lake Huron* succeeded in making fast, the boat service being performed by the *Spree*, and by 8 P.M. on December 3, the disabled steamer was safely anchored in Queenstown harbour, after a towage of 757 miles, in 137 hours, at a speed of from five to six knots, the wind during the time having gone round by the southward to the eastward, and varying from a fresh to a moderate gale with some sea and swell.

On December 5 the owners, master, and crew of the *Lake Huron* issued a writ in rem, against the owners and parties interested in the *Spree*, her cargo, and freight, claiming compensation for these salvage services, and for life salvage to the passengers and crew.

By agreement between the Canada Shipping Company and the North German Lloyd, the action was settled for 12,000*l.*, the Canada Shipping Company undertaking to settle the claims of their master and crew.

Feb. 7. *Butler Aspinall*, applied for apportionment of the 12,000*l.* between the owners, master, and crew of the *Lake Huron*.

It appeared, however, that there were on board the vessel, as is usual in passenger ships, a surgeon, stewards, cooks, a baker, stewardess, and two cabin boys, in all eleven persons, who had taken no active part in the actual salvage services, and the learned judge thereupon desired to have the assistance of two of the Elder Brethren of the Trinity House on the question of the proper distribution of the salvage reward amongst a crew so composed, and two Trinity Masters were accordingly summoned.

Gorell Barnes, J. I find after consultation with the Elder Brethren that they agree with me in thinking that the persons not employed in the actual working of the salving ship, during towage operations, ought not to be put on the same footing as those so engaged. On the other hand, I am informed by the Registrar that it is not the practice to exclude anybody who is on the ship's books as part of the crew.

As a very large sum will be available, out of the 12,000*l.*, for distribution amongst the crew, I think it will be expedient to lay down some rule to meet cases of this sort.

A complete list of the crew shewing their rate of pay must be sent into the registry, and it will be desirable, as there is a conflict of interest, that the portion of the crew not engaged in the actual navigation of the *Lake Huron* should be separately represented. (1)

Feb. 14. *F. W. Raikes*, for the non-navigating members of the crew of the *Lake Huron*. It must be admitted that, in this case, the stewards and others of that class were not called upon to assist in the actual navigation; but as regards their personal safety, they ran the same risk as the rest of the crew on board the salving vessel. It is also obvious that as the watches necessarily become disorganized during the towage, by reason of more officers and hands being required both on deck and in the engine-room, increased duties are thereby thrown upon the stewards' department. The passengers (of whom there were thirty-three on board the *Lake Huron*) also become alarmed and discontented by the inevitable inconveniences and delay due to a long towage, and to pacify them is a duty which falls principally on those in immediate attendance on them. Further than this, it appears from the affidavit of the master, the chief engineer, and the chief steward of the *Lake Huron*, that when that vessel came up with the disabled steamer, and it seemed likely that her passengers and crew would have to be taken on board the *Lake Huron*, it became necessary to make a careful examination of the stock of provisions, and to economise their own consumption.

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(1) According to the portage bill, subsequently supplied for the information of the Court, it appeared that the rate of pay of the eleven persons in question was as follows: surgeon, 8*l.*; chief steward, 9*l.*; second steward, 4*l.* 10*s.*; intermediate and steerage stewards, 4*l.* each; stewardess, 2*l.* 10*s.*; chief cook, 7*l.* 10*s.*; ship's cook, 4*l.*; baker, 6*l.* 10*s.*; two boys, 1*l.* each per month.

As regards the pay of the stewards, although this may seem large, as compared with that of some of the crew, it must be borne in mind that this class of persons expect to make a considerable addition from the gifts of the passengers, and, therefore, in distributing salvage according to their rating on the ship's books, the stewards will not really get a distribution according to their actual earnings. The pay of the surgeon also is small, but during a salvage service he is likely to be called upon to perform extra work, owing to the injuries which are apt to occur from ropes carrying away, and for such accidents he must be always prepared. If the practice in the Royal Navy be taken as a guide, it will be found that, under the last prize proclamation of August 3, 1886, members of the civil branch of the service share salvage rewards (when not otherwise specially apportioned) in the same way that prize money is shared—that is, according to rating, so that, for example, a chaplain of fifteen years' service shares with a commander. On the whole, it is submitted that there is no ground for departing from the existing practice, which is to distribute the portion of the salvage award allotted to the crew amongst the whole of the persons on the ship's books according to their rating. There is no precedent for any other course, for in the case of *The Coriolanus* (1) the eighteen cattlemen, who were excluded from participating in the remuneration payable for the salvage service performed by the

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(1) 15 P. D. 103.

Bostonian, were only nominally on the ship's articles at the rate of one shilling each for the voyage.

Butler Aspinall, for the owners of the *Lake Huron.* No objection is raised to the position taken up by counsel for the non-navigating members of the crew on board the vessel; but it is submitted that the Court, in making the apportionment, will have regard to the great value of the *Lake Huron,* and to the risks to which she was exposed; and will also, as in the case of *The Edenmore* (1), take into account, in the first instance, in favour of the owners as against the crew, the expenses incurred, which have been verified by affidavit, viz.,—proportion of time insurance due to the loss of four days, extra coals, victualling of the passengers and crew, wages of the crew, cost of engine-room stores and of making good the damage sustained by the hull and machinery of the *Lake Huron,* amounting in all to the sum of 1189*l.* 4*s.* 4*d.*

Gorell Barnes, J. [The learned judge stated the nature of the case, and gave the details already set out as to the size of the salving and salved vessels, and continued:—]

I do not think that the services themselves call for any special comment at this moment. They substantially consisted in the successful towage of the *Spree* into port, and the owners of the *Spree,* her cargo and freight, thought it right to settle the salvage claim for 12,000*l.* It is that sum which I am now asked to apportion between the owners of the *Lake Huron* and her master and crew.

The first point to consider is what sum, having regard to all the facts alleged, to the expenses to which the owners were put, and to the risk to the owner's property, these owners should receive of the total amount. Giving the best judgment I can, and having regard to these expenses, which I ought to say include all the possible expenses up to Queenstown, and certain extra charges and repairs, I think that 9200*l.* is a proper sum to allot to the owners.

That leaves the sum of 2800*l.* to apportion between the master and the crew, and the first person to consider in such a a case is the master. He had to take charge during an anxious time on board his vessel while communication was being made between the two ships, and appears to have conducted the manœuvres with great skill, assisted by the officers of experience who were with him. I think that, having regard to his services, he ought to receive a sum of 800*l.*

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(1) Ante, p. 79.

That leaves the sum of 2000*l.* to allot amongst the crew, and I see no reason, after hearing the discussion of this case, to make any special distinction between the various navigating members of the crew—that is to say, the officers, seamen, engineers, firemen, donkey-men, the storekeeper, greaser, trimmer, and others belonging to what I may call, for the purpose of a short statement, the active navigating part of the steamship's crew.

A point, however, arises, which it is important to consider, having regard to the fact that salvage services are now rendered, and may in future be often rendered, by large steamers carrying a considerable number of non-navigating persons—that is to say, persons who are simply there for the purpose of attending on the passengers—stewards, cooks, and others—or whose principal duties, at any rate, are of that character.

I have not been referred to any authority in the course of this discussion, but I have taken an opportunity of looking through a good number of cases, and I think I ought to say that in this class of case no refined distinctions should be introduced between classes of services on board ship, because it would, otherwise, render it extremely difficult to arrive at a salvage award. It has, therefore, been the practice to take a broad view, and to say that the crew are properly rewarded if their portion of the salvage award is distributed according to their ratings.

There are many cases, however, in which a departure from that rule has been acted upon in this Court, where there has been special danger incurred; for instance, in the case of a certain portion of the crew taking a boat at considerable risk to connect one steamer with the other, and in that case it has been very common for the Court to say that those men ought to take a double portion. Possibly that is not commensurate with the risk they run as compared with those who remain on board the ship, but it affords a sufficiently fair rough-and-ready mode of dealing with the matter without great nicety or refinement.

I am not at all prepared to say that stewards and others ought to be looked upon with a discriminating eye, for the simple reason that, although their duties are not such as bring them in contact ordinarily with the regular work of navigation, they may at any moment be called upon to assist in the salvage operations, as happened in a case recently before me (1), where all available hands on board the ship were ordered by the master to assist in making fast, and the stewards, and possibly even the stewardess, in that case did everything that was desired.

In this particular case, however, according to the admission of their counsel, the non-navigating members of the crew did not take any part in rendering assistance to the other ship; but it must not be forgotten that they were there ready to do anything that might be required, and incurred any risk which might endanger the ship herself. At the same time, it is perfectly obvious that they did not run any real risk beyond what was run by the ship herself, nor did they perform any other duties at all except being a little longer on their passage, and making some preparations for receiving the crew of the other vessel in case anything happened to her.

Acting on the principles the Court has always been guided by, viz., to try to apportion the salvage award in such a way as to do what is right between all parties, it will be well, in this particular case, without laying it down as a rule (as one must judge of each case as it arises), to say that these people, whom I have mentioned, to the number of eleven, ought to

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(1) The *Noordland* (1893, O. No. 22). In this case, tried before Gorell Barnes, J., on February 9, the statement of claim, of the owners, master, and crew of the salving steamer *Ohio*, contained the following paragraph with reference to making fast: "All hands on the *Ohio* thereupon proceeded to get up the towing hawser, and mooring chains, from the forepeak, and carry them over all, there being no alley-ways to aft, a work of considerable difficulty and labour owing to heavy rolling of the ship," and the master of the *Ohio*, in his evidence, stated that all persons on board, that could be spared, including stewards, were called upon to assist in carrying the hawser, &c., from forward aft in order to take the disabled steamer *Noordland* in tow.

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receive a half-share. That will not, I think, present serious difficulty in working out. The decree I make will be: That the crew, other than the captain, shall receive salvage in the usual way according to their ratings, but these eleven persons shall only have a half-share in accordance with their ratings. I should add that, looking at the ratings of these men, many of them will, with the reduced apportionment, get nearly as much as the others, and some of them certainly as much as the able seamen. The costs of the application to apportion will come out of the salvage fund.

Solicitors: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

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March 13, 14.

THE LIVERPOOL.

Admiralty—Salvage—Contract to Tow—Risk to Tug—Danger to Tow—Conditions required before Salvage engrafted on Towage.

The plaintiffs' tug was engaged, for a fixed sum, to tow from sea, and dock the defendants' ship.

Whilst the plaintiffs' tug was, under the direction of the pilot, turning the ship round, in order to enter the dock stern first, the tow-rope of another tug fast on the ship's quarter parted, and, through the effect of the wind and tide, the ship touched the ground. The plaintiffs' tug, by the direction of the pilot, then shifted her position, and proceeded to tow the ship into dock bow first. In so doing the ship came off.

The plaintiffs claimed salvage remuneration, alleging that their tug had rescued the defendants' ship from a position of danger.

Held, that the plaintiffs were not entitled to salvage remuneration, as the ship was not in any immediate danger, and the tug had not run any risk or performed any duty or rendered any services beyond what, in the contemplation of the parties, was reasonably to be expected of her during the continuance of the towage contract.

The conditions required to engraft salvage on towage considered.

ACTION of salvage. The plaintiffs were the owners, master, and crew of the steam-tug *Stormcock*; the defendants were the owners of the ship *Liverpool*.

The facts—so far as material on the question whether the tug had rendered services, in the nature of salvage, beyond the scope of her towage agreement—were shortly as follows:—

On January 23, 1893, the plaintiffs' twin-screw steam-tug

Stormcock—of 59 tons nett and 419 tons gross register, with engines of 300 nominal, working up to 1500 actual horse-power, manned by a crew of 12 hands—was engaged for the sum of 55*l.*, to find her own hawser, and tow from sea, and dock, the defendants' four-masted steel sailing-ship *Liverpool*, of 3330 tons register, and drawing 22 ft. 10 in. aft, with a crew of 37 hands, and a general cargo from San Francisco to Liverpool.

The *Stormcock* towed the *Liverpool* up the Mersey, and, about 3 P.M. on January 24, arrived opposite the entrance to the Herculaneum Dock.

It was the intention of the pilot in charge of the *Liverpool* to dock stern first, and the *Stormcock* was directed to round the vessel to the northward, head to tide, whilst the tug *Agnes Seed* (which had also been engaged to assist in docking, and was separately paid) was fast on the port quarter of the *Liverpool*, and checked the vessel's way. The tide was flood, it being high water at 3.49. There was a moderate westerly breeze of force 4, and the effect of the wind and eddy tide, acting on the port side of the *Liverpool*, was to cause her to forge ahead to the northward, and carry her past the entrance to the dock. Observing this, the *Agnes Seed* was ordered to shift her tow-rope aft, which she did, but, when a strain came upon the hawser, it parted. Thereupon the pilot, seeing that it was impracticable to get into dock stern first, directed the *Stormcock* to tow the *Liverpool* round to the S.W., so as to head for the dock entrance; but before the *Stormcock* had got into such a position as to be able to execute this manœuvre, the heel of the *Liverpool* touched the soft red sandstone rock which lies upon the foreshore of the river about 100 feet from the dock wall, and nearly opposite the entrance of the Harrington Dock. The depth of the water at the place where she touched was, at the time, 22 ft. 8 in.

Another tug, the *Weathercock*, now made fast astern, and the *Agnes Seed* on the port quarter, whilst the *Stormcock*, getting a straight pull, towed the *Liverpool* in such a direction that she came off. This was the alleged salvage service, and it was further alleged by the plaintiffs, that, at this time, such a great strain came upon the 15-inch manilla towing hawser belonging to the *Stormcock* as to damage it.

As soon as the *Liverpool* had been brought up to the dock gates, the hawser of the *Stormcock* was cast off, and ropes having been got out from the *Liverpool* to the pierhead, whilst the *Agnes Seed* went in by another entrance, the vessel proceeded into the dock, bow first, without further difficulty.

Those on board the *Liverpool* were not at the time aware that the vessel had grounded, and the defendants pleaded that she "was never aground"; but it was proved that the barnacles and paint were rubbed off on the starboard side from the sternpost for a length of 75 ft. 3 in., and to a height of 16½ inches, and, according to the dock-master, there was at the spot in question a ridge of rubble and broken rock raised, which in his opinion was caused by the ship's heel as she drifted in towards the wall and subsequently slewed.

The values were: tug *Stormcock*, 15,000*l.*, ship *Liverpool*, 25,000*l.*, cargo 29,000*l.*, freight 5550*l.*; total 59,550*l.*

Aspinall, Q.C., and *W. F. Taylor*, for the plaintiffs. When the stern of the *Liverpool* grounded she was in a position of extreme peril. There was little more than a quarter-of-an-hour's flood, only 8 inches further rise, and the eddy tide was already running down in shore. Both tide and wind were forcing the vessel towards the dock wall, and she was drifting into shallower water. Had it not been for the exceptional power of the *Stormcock*, and the skill and promptitude with which at the critical moment, when the rope of the *Agnes Seed* parted, that power was brought to bear on the ship, the *Liverpool* would not have come off, but would inevitably have remained fast on the rocks and broken in two.

It is well settled that supervening circumstances outside the scope of the towage agreement will entitle the tug to claim remuneration on a salvage scale. In the case of *The Saratoga* (1), in which there was, as here, an ordinary towage and docking contract, Dr. Lushington said (2): "The ship was placed in imminent peril of receiving serious damage, which the parties to the contract of towage had never contemplated, and from this peril the ship was rescued by the (tug) which was then fast to her and towing. This was a salvage service."

(1) Lush. 318.

(2) At p. 322.

The facts in *The I. C. Potter* (1) are stronger than in the present case, because there the hawser continued fast the whole time that the tug was towing the ship during a gale of wind, and counsel for the ship relied upon this as shewing that the service remained towage throughout; but as the ship was thereby prevented from drifting upon a lee shore, Sir Robert Phillimore held the tug to be entitled to a liberal salvage reward.

Assuming that there was no risk to the tug, still this will not deprive her of salvage, for, in the words of Dr. Lushington in *The Pericles* (2), "risk to the salvor is not a necessary element of salvage, though it does, as we all know, enhance the merit of the service, and earn a higher reward." If the tug had brought it about that the ship got into danger, then no doubt there would be no claim for salvage in extricating her from that danger; but the ship grounded, and so got into danger through an unavoidable accident, with which the tug had nothing to do, and from that danger she was rescued by the tug. This was a supervening circumstance not contemplated by the parties to the towage contract, and, though the circumstances were not such as to entitle the tug to abandon her contract, this will not prevent a claim for salvage, as in awarding salvage in the case of *Five Steel Barges* (3) the late President (Lord Hannen) said: "From the examination I have given to the decisions in point, it appears to me that it is not necessary, in order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract." Here the *Liverpool* got into danger in spite of the *Stormcock*, for it was an essential part of the contract that the ship should provide herself with another tug to assist in turning her round in order to get into dock; but the tug so employed was not powerful enough, and her hawser parted whilst the operation was proceeding. This produced the danger, and placed the ship in a position of peril not contemplated by the parties, and from the peril in which the ship was thus placed the *Stormcock* rescued her.

Joseph Walton, Q.C., and *Maurice Hill*, for the defendants.

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(1) Law Rep. 3 A. & E. 292.

(2) Br. & L. 80, at p. 81.

(3) 15 P. D. 142.

Admitting that the *Stormcock* is one of the most powerful tugs in the Mersey, that will not help the plaintiffs, as that fact would be in the minds of the defendants as a reason for employing her to tow and dock so large a vessel as the *Liverpool*; nor will the fact that the rope of the *Agnes Seed* parted affect the question. That tug is a small one, and was not employed to tow the *Liverpool*, but for the special purpose of assisting in the docking, and also to take the vessel into the dock after the *Stormcock* would, in the ordinary course, let go. Such a mishap, as the rope of the *Agnes Seed* parting, is always possible during the performance of a towage contract, and admitting also that the *Liverpool* did touch, through the breaking of the rope of the *Agnes Seed*, that fact will not turn towage into salvage, as it was still the duty of the *Stormcock* to do her best to tow the vessel off.

It is a fallacy to assume that because there is danger to the tow, or some additional difficulty, therefore the towage contract is at an end, and a claim for salvage arises. There is always some danger to the tow, and in the majority of cases some alteration in the character of the service occurs; but unless the danger to the tow imposes upon the tug some additional and extraordinary service, not within the scope of the towage contract, no right to salvage arises, and the words of the judgment in *The Lady Egidia* (1), quoted from *The Minnehaha* (2), may be applied here, viz.: that the tug has not "incurred any risk, or performed any duty which was not within the scope of her original engagement."

There must be a substantial change in the character of the towage. It is not enough that the tow was in a temporary difficulty, for the tug was bound to attach her hawser to the ship and tow her out of danger, and in so doing the tug would not be rendering any services beyond those which she had stipulated to render by the contract of towage. Lord Kingsdown, in delivering the judgment of the Privy Council in *The Annapolis* (3), points out (4) that even the imminent danger of the tow, as in the case of collision, would not be sufficient to entitle the tug to salvage if the towage service was not interrupted.

(1) Lush. 513.
(2) Lush. 335, at p. 347.
(3) Lush. 355.
(4) At p. 374.

The real question is, "Were any services rendered beyond what was reasonably contemplated under the contract?" To this the answer, it is submitted, must be in the negative, as the *Liverpool* was entitled to the services which the *Stormcock* did render, and those services sufficed to tow the vessel out of danger. (1)

Aspinall, Q.C., in reply.

GORELL BARNES, J. (after detailing the facts of the case, already set out, continued). It is in respect of the alleged rescue of the vessel from the position of danger in which it is urged she was, in touching the ground, that the plaintiffs make their salvage claim. The case has taken some little time to discuss, owing to the fact that all the cases which bear upon this subject have, as was quite right, been referred to.

When the cases are examined, I think there can be no question about the law applicable to such a case as the present. In fact, counsel on both sides have relied upon the statement of the law as found in the judgment of the Privy Council delivered by Lord Kingsdown in *The Minnehaha* (2) as being a correct statement of their own view of it, and of the view which has been since that time, and probably before, accepted by the Court.

The law, as laid down by Lord Kingsdown (2) is as follows:— "But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage. It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the performance of her contract by the impossibility of performing it; but if the performance of it be possible, but in the course of it the ship in her charge is exposed by unavoidable accident, to dangers which require from the tug services of a different class, and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate."

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(1) The arguments of counsel as to the liability of the tow for the chafing of the hawser of the tug are omitted, as the learned judge declined to adopt the view that the hawser had been injured.

(2) Lush. 335, at p. 347.

Several other cases have been cited to me more for the facts to which these principles have been applied. Perhaps the cases which have been most discussed have been those of *The Pericles* (1), *The Lady Egidia* (2), and *The Annapolis.* (3)

Counsel for the plaintiffs laid great stress on the fact that there was danger to the salved vessel from which, in the course of the towage, she was rescued, and that therefore the salvor was entitled to salvage, and there is no question whatever that unless there is danger, the salvor cannot maintain any claim for salvage. But I do not think that the argument on behalf of the plaintiffs can be placed quite so high as counsel endeavoured to put it, namely, that in all cases of danger to the salved property, the tow is entitled to a salvage award, because that would only be embracing half the proposition to be found in the cases, which is, that there must be danger to the salved property, and something done either in the nature of risk run or extra services performed by the tug, beyond that which is included in the contemplation of the parties in the service which she is engaged to perform.

When the case of *The Pericles* (1) is looked at, it will be found not to conflict in the least with anything said in *The Minnehaha* (4), but to be a case in which, having regard to the

(1) Br. & L. 80.
(2) Lush. 513.
(3) Lush. 355.
(4) Lush. 335.

facts, the Court must have come to the conclusion that the services were beyond those which the tug had agreed to perform.

In the case of *The Lady Egidia* (1), the other view was taken of the facts, but the same principle was applied. Lord Kingsdown's judgment was referred to, and it was held that the salving vessel had not incurred any risk or performed any duty which was not within the scope of her original contract.

The difficulty of the case is really not in the statement of the law, but in the application of the law to the particular facts of the case. It is perfectly easy to state a case, on the one hand, in which it is clear that the right to salvage ought to be allowed; and to state a case, on the other hand, in which it is equally clear that the claim for salvage ought to be disallowed. There is a kind of line between the two which renders this case and other cases of the same kind somewhat difficult to determine. Lord Cranworth in a well-known case (2) said (3): "There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine." So it is in a case of this particular kind which we have before us.

The first point to consider is the danger or risk from which the *Liverpool* is said to have been preserved. I have heard the whole of the evidence, and considered the point with care, assisted by the Elder Brethren, and the first matter to refer to is the state of the ship's bottom as found after the accident. As has been pointed out by counsel for the defendants, the plaintiffs appear to have waited until they had had an opportunity of seeing what the state of the bottom was, in order to judge whether they had, in fact, rescued the ship from something which was a source of danger to her, and, after that inspection, the claim was apparently launched. The evidence is to the effect that, from some 70 feet from the vessel's stern, the barnacles, which had accumulated on the ship in the course of her voyage, had been rubbed off on the starboard side of the garboard strake. The mark of the rubbing off gradually rose until it reached the height of some 15 or 18 inches up the garboard strake, at the

(1) Lush. 513.

(2) *Boyse* v. *Rossborough*, 6 H. L. Cas. 3.

(3) At p. 45.

extreme end of the vessel. The garboard strake in this vessel was fitted so that it was slightly above the bottom of the keel, but apparently the edges of the keel and the paint were uninjured. The paint was not injured except in one spot, and the barnacles are stated to have been left still sticking out at the extreme end of the keel, and to be entirely unaffected on the port side of the garboard strake and the keel. One other matter fit to mention is that those on board the *Liverpool* appear to have been entirely unaware that their ship was touching; and I think, if I recollect rightly, they so stated to the dock-master on the following day. The case is thus singular in this, that the claim for salvage is made against a vessel, the crew of which appear to have been entirely unaware of the fact that their vessel was in danger at the time the services were being rendered.

[The learned judge then dealt with the evidence as to the vessel having grounded, and continued:—]

The conclusion of fact to which I come is that it was not a grounding of the ship at all, within the proper sense of that term, but that it was really a touching of the bottom, and that, as she was moved off, the accumulated surface of the ground —whether soft mud or any other deposit is immaterial for this purpose—rose and formed a slight bank which increased with the scraping of the vessel, and thus marked the garboard strake higher aft than further forward, but as soon as the vessel was turned she was pulled round without any difficulty, and taken into the dock. In fact, to put it in a short form, I do not think on the evidence that this vessel was ever fast on the ground.

I have asked the Elder Brethren these questions, which seemed to me matters for their consideration, though I also will express my view upon them. The first is whether the *Liverpool* was in any immediate danger, and they are both strongly of opinion that she was not. I have also asked whether the *Stormcock* incurred any risk or performed any duties or rendered any services beyond what was reasonably to be expected of her in the performance of her towing contract, and they entertain a strong opinion in the negative.

I must say that, as far as I am competent to judge, I entirely agree with them in the answers which they have given to these two questions. It seems to me that in such a case as this the tug is engaged for the purpose of avoiding dangers which a vessel of this size must to some extent always run in entering a dock, and that it cannot be expected that a vessel will, with absolute certainty and precision, make her way into a dock unattended by any slight deviation from what is her direct course. Really when one comes to consider this case, it is obvious that, with a rising tide and the position in which the ship was, she was in no immediate danger at all. Of course, if she had been left there until the tide had fallen she would have been injured, and so she would have been if she had been afloat but had been left lying alongside the dock wall. If she had moved past the dock entrance and lay alongside the dock wall, and nothing was done with her, I suppose, unless it were perfectly flat on the bottom, she would break her back when the tide fell. But the vessel was turned round, having got a little too far from the entrance, and in turning round she touched slightly against the rock, or muddy surface of the rock, I care not which, and was then taken without difficulty into the dock. In doing that it seems to me quite clear that this large and powerful tug did absolutely nothing more than she ought to do, and would be expected to do, in almost every case of a vessel passing a little too far beyond the dock entrance.

Then it is said that there is some difference in this case because the *Agnes Seed* had parted her rope. It is quite true that she did; but it does not appear to me, nor to the Elder Brethren, that that parting actually caused any additional work to the *Stormcock* beyond what she was really bound to do.

Lastly, it is suggested that because the hawser was said to be damaged, that would turn the towage into a salvage service. That is a very strong proposition, and it appears to me unfounded in fact, because I do not think that there is any evidence to satisfy me that the hawser incurred more than its ordinary wear and tear in the performance of that towage. When I find recorded in the log-book of February 2 that this very hawser, as we are also told by the witnesses, was being used to tow a ship, called the *Eurydice*, when it was blowing a heavy gale, and

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when there was a cross sea, and that then the hawser parted, I cannot bring myself to believe that the hawser sustained any injury of material importance at the time of this particular occurrence. If it did, I cannot understand how it could be said that they were properly using it when they were towing the *Eurydice.*

I ought to say that, while it is the duty of the Court to take care to adequately remunerate all salvors for salvage services, in order to encourage those services to be performed—and in this spirit salvage services are always looked upon in this Court—it is equally the duty of the Court to see, where a towing contract has been made, that a little departure from the exact mode in which that contract is to be performed is not magnified so as to convert towage into salvage services.

Having regard to these various considerations, I am of opinion that this claim for salvage is not established, and ought to be dismissed with costs.

Solicitors for the plaintiffs: *J. W. Thompson, Liverpool.*

Solicitors for the defendants: *Hill, Dickinson, Dickinson, & Hill, Liverpool.*

T. L. M.

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March 14, 15, 21.

THE GLENLIVET.

Admiralty—Ship—Marine Insurance—Loss by Fire—Memorandum in Lloyd's Policy—" Free from Average under 3 *per Cent., unless general, or the Ship be . . . burnt."*

A ship is "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt"—when the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is, pro tempore, incapable of being properly used for the purposes of her voyage; that is, when the ship is temporarily innavigable.

HEARING, upon point of law, as to the construction of the memorandum commonly used in a Lloyd's policy.

The plaintiffs were the Glenlivet Steamship Company, Limited. The defendant was John Henry Titcombe, an underwriter at Lloyd's. The action was brought to recover the defendant's proportion of claims made by the plaintiffs upon their insurers under policies on the *Glenlivet.* The ship was insured at certain valuations of the hull and materials, machinery and boilers, for twelve calendar months, under a policy dated August 26, 1891, commencing August 29, and from August 29, 1892, for a similar period under another policy dated August 25 of that year. These policies contained the usual memorandum printed in a Lloyd's policy, viz.: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded" (added in writing), "sunk, or burnt." And there was also added in writing: "The warranty and conditions as to average under 3 per cent. to be applicable to each out and home voyage as if separately insured and not to the whole time insured."

Fires (the details of which fully appear from the judgment) occurred on board the *Glenlivet* on three several and separate voyages, which, for purposes of convenience, were described as No. 1, No. 2, and No. 4 voyages. The claims made in respect of the damage to the ship and her stores so sustained were all under 3 per cent.

According to a joint statement of issues:—

"The question for the Court" was "whether the *Glenlivet* was, or was not, 'burnt' within the meaning and intent of the policies on all or any of the separate voyages in question. . . ."

"If the Court should be of opinion that the vessel was 'burnt' in course of voyage No. 1, the defendant is liable for his proportion of the sum of 5*l.* 4*s.* 10*d.*"

"If the Court should be of opinion that the vessel was 'burnt' in the course of voyage No. 2, the defendant is liable for his proportion of 47*l.* 19*s.* 2*d.*"

The two sums together amounted to 53*l.* 4*s.*, or 7*s.* 2*d.* per cent. on steamer, valued at 15,000*l.*, under the policy of August 26, 1891.

"If the Court should be of opinion that the vessel was 'burnt' in the course of voyage No. 4, the defendant is liable for his

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proportion of 369*l.* 8*s.* 6*d.*," or 2*l.* 12*s.* 10*d.* per cent. on steamer, valued at 14,000*l.*, under policy of August 25, 1892.

To the statement of issues was appended a document embodying particulars of the routes and termini of the three voyages in question, also the entries from the log-books relating to the occurrences on these voyages, and extracts from the survey reports shewing the nature and extent of the damage thereby occasioned and the repairs recommended. The original log-books, survey reports, and the policies were also produced in Court, but the parties agreed to adduce no further evidence.

March 14, 15. On these documents—which were such as an average stater requires for the purposes of an average adjustment—the case was argued by—

Aspinall, Q.C., for the plaintiffs.

Joseph Walton, Q.C., for the defendant.

The arguments of counsel fully appear from the judgment. In addition to the cases mentioned therein counsel for the plaintiffs, on the question of the bunker coal being covered by the insurance on ship referred to: *Hill* v. *Patten* (1); *Forbes* v. *Aspinall.* (2) On the meaning of the word "stranded" as explaining the word "burnt," to *Wells* v. *Hopwood* (3); McArthur's Contract of Marine Insurance (2nd ed. p. 302). And, on the same point, counsel for the defendant referred to *Hoffman* v. *Marshall.* (4)

Cur. adv. vult.

March 21. GORELL BARNES, J. [after commenting on the advantages of following the simple procedure adopted in the case of *The Alps* (5), by which the present case had been heard within a fortnight of its commencement, the learned judge continued.] The question is as to the meaning of the term "burnt" in the memorandum commonly used in a Lloyd's policy.

In order to appreciate the point, it is necessary first to state the facts shortly. [The learned judge then detailed the nature of the claims, and read the memorandum in the policy already set out, and proceeded :—] During the first voyage, according to the ship's log-book, on May 6, 1892, at 8 A.M., they observed that the cross bunker was on fire. That means that the coals in it had heated. They discharged part of the coal, and took steps to put the fire out by pumping water on it, and on the 29th they again observed the port bunker on fire, and took steps to put it out by pumping water upon it. There was therefore some heating of the coal, which was put out by pumping water upon it, and no damage whatever to the ship's structure or to any part of the ship herself. During the second voyage on July 26, they found the starboard bunker to be on fire, and commenced working coal out and pumping water down to put it out, and "burnt the deck hose in doing so"; and on the 27th they found that a fire had broken out in the starboard bunker again, and commenced trimming the coal and pumping water down to put it out. And, I think, in the engineer's log-book on that occasion the starboard side bunker was stated to be on fire and aflame. It records: "Put hose in and extinguished it, working from 11 A.M. to 3.30 P.M. Bunker deck-plate slightly buckled, seams badly strained." According to the survey report after this voyage, it was found that the "second strake plate of bunker 'tween deck abaft bunker hatch was buckled downwards, the angle-iron round bunker hatch buckled, the plating of bunker side and main shell plates and frames for 12 ft. with paint burnt off, coals in side bunkers required to be removed to effect the repairs, estimated about ten tons of coals destroyed. Saw some of the coal which had been fired converted into coke." So that there again there was heating of the coals; but it was put out, and before it was put out it was accompanied with damage to the plating of the ship as described in the surveyor's report. On the fourth voyage the cross bunker was found (on October 14 at 3 A.M.) to be on fire, and by the aid of the crew drawing water with buckets they extinguished it by 4 A.M. And in the engineer's log it is described as, "All hands called out to extinguish a fire in the bunker, plates buckled badly and split." And in the surveyor's report of the injury done on this voyage it is stated that "one plate and angle bar in cross bunker (hatch bulkhead) buckled and broken, riveting started, brick and wood casing destroyed, also four hatches and one fore and after. Donkey funnel damaged, buckled, and bent." There, again, that was a case of heating of the coal in the bunker, and injury to the ship's plating and otherwise, as in the report before the fire was extinguished.

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(1) 8 East, 373.

(2) 13 East, 323, at p. 325.

(3) 3 B. & Ad. 20.

(4) 2 Bing. N. C. 383.

(5) Ante, p. 109.

The claim on the first voyage is for a small average loss under 3 per cent. from perils other than fire, and on the second and fourth voyages, for small average losses to the vessel herself under 3 per cent., partly from fire, and partly from other perils insured against. It is agreed that if the ship was "burnt" on any of the said voyages the plaintiffs are entitled to recover for the loss occurring on the voyage or voyages on which the burning occurred, and that if she was not "burnt" they are not so entitled. I have, therefore, to determine whether the ship was "burnt" on any of the said voyages within the meaning of that term in the memorandum.

As the memorandum originally stood when it was introduced in the policies, about the year 1749, it did not contain the words "sunk or burnt." I am informed that they have been in use for over thirty years, and I find them in the policy in *Great Indian Peninsula Ry. Co.* v. *Saunders* (1), decided in the year 1861.

The memorandum itself was framed to protect the underwriters from frivolous demands in respect of small losses, which are most likely to have arisen from natural deterioration or wear and tear, and the original exception of stranding tends to shew that this was the scope of the memorandum.

The framers had, probably, in view, a casualty of so serious a nature as to be akin to wreck, that is, such a loss as makes it probable that the damage, though under the given percentage, might reasonably be attributed thereto, and not to the perishable nature of the subject-matter of the insurance. Several cases were decided upon the memorandum after its introduction, and, for a time, there was a difference of opinion as to its true construction; Lord Mansfield and Buller, J., holding that the words "unless general or the ship be stranded" constituted an

(1) 1 B. & S. 41.

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exception, and that the clause should be read, "free from average, except general average and average occasioned by the ship having been stranded"; Ryder, C.J., and Lord Kenyon, holding, on the other hand, that the words "or the ship be stranded," constituted a condition, so that, if the ship be stranded in the course of the voyage, the underwriters are liable for an average loss by perils insured against, though no part of the loss arise from the stranding; and so it was finally held, after full argument, in *Burnett* v. *Kensington.* (1)

If, therefore, the ship be stranded, the warranty against average, or against average under 5 or 3 per cent., is destroyed, and in order to recover for damage which, but for the stranding, would not have been recoverable, it is then not necessary to prove that the damage was occasioned by the stranding, and it follows that, in all cases of alleged stranding, the inquiry is to be, what condition of the ship constitutes a stranding. So, also, the inquiry in cases where it is said the ship was "sunk or burnt" is, what condition of the ship satisfies the term "sunk or burnt"?

There have been a large number of decisions upon the word "stranding," and in these various definitions of that word may be found; but, in my opinion, there runs through them all, in a greater or less degree, the idea, which was probably present to the minds of the framers of the memorandum, of a serious casualty to the ship affecting her safety and navigation, even though, as a matter of fact, the amount of damage sustained by the ship is unimportant.

This idea is tersely expressed by Lord Ellenborough in the case of *McDougle* v. *Royal Exchange Assurance Co.* (2), where he says: "I take it that stranding in its fair legal sense implies a settling of the ship—some resting or interruption of the voyage, so that the ship may, pro tempore, be considered as wrecked: from which misfortune a great deal of damage does frequently occur." That is to say, the vessel becomes for a time in a condition in which she cannot be properly used for the purpose of her voyage, and is innavigable.

From the collocation of the words "sunk or burnt" with the word "stranded," and from the primary impression produced by reading those words "sunk or burnt," it is natural and reasonable to construe them upon the principle applied, and with the idea prevailing, in arriving at the proper meaning of the word "stranded."

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(1) 7 T. R. 210.

(2) 4 M. & S. 503.

The contention of the plaintiffs is that the ship is "burnt," within the true meaning of the clause, if any injury whatever is done by fire to any part of the vessel, or any part of her fittings or stores—in other words, if anything included in the term "ship" is on fire, for however short a time, or damaged by fire, however slightly.

Mr. Aspinall illustrated his argument by quoting the saying, "A burnt child dreads the fire," and urged that the meaning of the word in the policy was similar in effect to that in the saying.

Mr. Walton, not to be outdone in illustration, quoted the lines from Drayton's "Battaile of Agincourt":—

> "This ayre of France doth like me wondrous well,
> Lets burne our ships, for here we meane to dwell."

He did not, however, contend that the word "burnt" was to be construed, in its primary meaning, as given in the dictionaries—namely, "consumed by fire"—so as to require a total consumption of the vessel by fire, but that the word would not be satisfied unless the burning was such as to render the vessel temporarily useless or innavigable.

There have been no cases on the word "sunk," except *Bryant & May* v. *London Assurance Corporation* (1), in which the report only refers to Grove, J., leaving questions to the jury about stranding; but my impression, from having been engaged in the case, is that the plaintiffs contended that the vessel had become so deep in the water that she could sink no more, and should be considered to have sunk. If I recollect aright, the vessel, in that case, never for a moment ceased to be navigable, nor was her voyage interrupted; and I think the suggestion that she was sunk was, therefore, not accepted.

There are no decisions upon the word "burnt" in the memorandum in a policy, and it is a remarkable fact that if, as

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(1) 2 Times L. Rep. 591.

Mr. Aspinall contended, the momentary setting fire to any part of a vessel—such, for instance, as cabin curtains or fittings—is enough to cause the vessel to be a "burnt" ship, and thereby destroy the warranty, that the present contention has never been brought before the Courts since the introduction of the words "sunk or burnt," though one would think that slight damage by fire was not unfrequent on vessels, especially large passenger vessels.

Cases on the word "burning," in the 6th section of the Statute of Frauds (29 Car. 2, c. 3), were cited to me in support of the plaintiffs' contention. They are not of much assistance in construing a mercantile document; but I may notice that Coleridge, J., in the case of *Doe* d. *Reed* v. *Harris* (1), says (2): "The question is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was"; and in the same case Lord Denman observed (3) that doubt might be entertained whether the proof in the case of *Bibb* d. *Mole* v. *Thomas* (4), referred to by him, and cited to me by Mr. Aspinall, would now be deemed sufficient to establish the burning of a will.

It was argued for the plaintiffs that the defendant's construction of the word "burnt" in a policy on ship would make the memorandum practically useless, because a fire which reduced the vessel to such a state that she could not be properly used would always exceed 3 per cent., and the damage caused by such a fire would be recoverable, whether the memorandum was inserted or not. But this argument omits the consideration that, if the ship is burnt, all damage under 3 per cent. caused by any peril insured against, whether before, or by, or after the fire, would be recoverable, and also that these words, "sunk or burnt," being commonly found now, as I understand, in policies on all kinds of goods, as well as in policies on ships, if the ship is burnt, average losses on goods, which might otherwise be excluded, would be recoverable under the policy. Again, this argument

(1) 6 Ad. & E. 209.
(2) At p. 217.
(3) At p. 215.
(4) 2 W. Bl. 1043.

would permit of the recovery of all loss by fire under a policy on a ship, although there is a warranty against losses under 3 per cent., which would place the peril of fire in a different position from any of the other perils insured against.

I cannot bring myself to think that it would be a reasonable or business-like construction of the word "burnt" to hold that the ship is burnt if any part of her, or of her stores, or of her fittings, is slightly injured by fire, whether that fire is one which exhausts itself without danger to the vessel, or, as was also suggested by the plaintiffs' counsel, is one which, unless promptly extinguished, would cause danger to the vessel. In my opinion, the more reasonable and business-like construction is, that the ship is "burnt" whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is, pro tempore, incapable of being properly used for the purposes of her voyage. That may be expressed by the term "temporarily innavigable."

In the present case, on the first voyage, the coals heated slightly, and, water being poured upon them, whatever fire existed was extinguished. Even assuming that coals are to be treated as included in the word "ship," which the plaintiffs alleged, and the defendant did not deny, there was no interruption of the voyage, nor any interference in any way with the navigation of the vessel. On the second and fourth voyages the heating of the coal caused some damage to the structure of the vessel; but again there was no interruption of the voyage, nor any interference with the vessel's navigation.

I am of opinion that on none of the voyages was the ship "burnt" within the meaning of the policy in this case, and that the defendant is entitled to judgment with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendant: *Waltons, Johnson, Bubb, & Whatton.*

T. L. M.

[DIVISIONAL COURT.]

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March 7, 22.

THE ALNE HOLME.

Admiralty—Charterparty—Strike Clause—Customary Mode of Discharge—Demurrage—Practice—Appellate Jurisdiction—Cross Appeal.

The defendants chartered the plaintiffs' vessel to load a cargo of timber, and therewith proceed to Sharpness and deliver the same "cargo to be . . . . taken from alongside vessel as customary at port of . . . . discharge . . . . (and) to be discharged with the customary steamer despatch of the port . . . . Sundays . . . . any time lost by reason of . . . . strikes, lock-outs, or combinations of workmen—whether partial or general—not to count as part of the . . . . discharging time . . . . If, through any fault of the merchants or charterers, the vessel be longer detained, demurrage to be paid at the (agreed) rate . . . . The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed." The customary mode of discharging timber at Sharpness is into lighters, by which the timber is taken up the canal to Gloucester, but when the vessel arrived on a Wednesday at Sharpness there were no lighters available, owing to a strike in the port of Gloucester amongst the labourers in the timber trade, who discharged the lighters there, so that the timber lighters were waiting at Gloucester to be unloaded. The strike at Gloucester came to an end on the Friday. On Saturday the discharge commenced, and was completed by noon on the following Tuesday week, that is, on the eleventh day (excluding Sundays) after the vessel's arrival. According to the customary steamer despatch the discharge would have occupied four-and-a-half days.

The plaintiffs sued the defendants in the county court for five days twenty-two hours' demurrage. The county court judge, after referring to *Nielsen* v. *Wait* (16 Q. B. D. 67), and holding that Sharpness is within the port of Gloucester, found that, after the strike came to an end, the defendants, with the exception of one day on which they were in default, did all that could reasonably be expected to discharge the vessel, and gave judgment for the plaintiffs for 22*l.* 5*s.* 10*d.*, one day's demurrage.

The plaintiffs appealed:—

Held, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes, J.)—affirming the judgment of the county court judge—that the defendants were not responsible beyond the one day, as the parties contemplated the customary mode of discharge, which was by lighters, and the discharge in that manner was delayed by the strike within the meaning of the charterparty.

Held also that, as the Divisional Court had only an appellate jurisdiction, the defendants could not be allowed to argue by way of cross-appeal against the judgment for one day's demurrage, as they had no right to originate an appeal questioning a judgment for an amount under 50*l.* depending upon an issue of fact.

Appeal by plaintiffs from the judgment of the judge of the county court of Glamorganshire, holden at Cardiff, giving them

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one day's demurrage of their vessel instead of the five days twenty-two hours claimed against the defendant charterers.

The facts were shortly that:—

By a charterparty dated July 15, 1890, it was agreed between the plaintiffs, Hine Brothers, owners of the steamship *Alne Holme*, of 1070 tons gross register, and the defendants, Thomas Adams & Co., timber merchants of Gloucester, charterers, that the steamer should proceed to Tornea, and there load, from the agents of the charterers, a cargo of deals, battens, and boards, "and being so loaded shall therewith proceed to Sharpness (thence to such dock, and berth, as may be ordered by the charterers, or by their agents, after receiving notice of arrival), or so near thereto as she may safely get, and deliver the same, always afloat on being paid (the agreed) freight" . . . . "cargo to be brought to, and taken from alongside vessel, as customary at port of loading and discharge . . . . cargo to be loaded and discharged with the customary steamer despatch of the port, and in the ordinary working hours thereof. Vessel to work at night if required by shippers or receivers of cargo. Sundays, general holidays, bank holidays, any time lost by reason of frost, floods, storms, tempests, strikes, lock-outs, or combinations of workmen —whether partial or general—not to count as part of the aforesaid loading or discharging time . . . . If, through any fault of the merchants, or charterers, the vessel be longer detained, demurrage to be paid at the rate of five pence per gross register ton per like day, and pro rata, per hour, for any part of the last of such days . . . . The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed."

Under this charter the *Alne Holme* left Tornea in Finland with the cargo of timber, and arrived at Sharpness at 10 A.M. on Wednesday, August 13, when notice of readiness to discharge was duly given.

The customary mode of discharging timber vessels at Sharpness is into timber lighters, by which the timber is taken up the canal to Gloucester; but there was, at the time, a strike in the port of Gloucester amongst the dock labourers in the timber trade, whose business it was to discharge the loaded lighters. This strike had been in existence for nearly six weeks, and the consequence was that all the timber lighters were at Gloucester, loaded with timber, which the consignees could not get unloaded there. The strike came to an end on the evening of August 15, the men beginning to work on the following morning, on which day (Saturday, August 16) the discharge of the cargo began, and was finished at noon on Tuesday, August 26, or eleven days (excluding Sundays) from the time the vessel was ready to deliver. According to the customary steamer despatch, the vessel could have discharged her cargo of 383 standards in four-and-a-half days.

In an Admiralty action, in personam, in the Cardiff County Court, for damages by way of demurrage, the plaintiffs alleged, first, that the obligation of the charterers to discharge commenced on August 14, and that there were five-and-a-half days' demurrage due, as the strike clause in the charterparty only applied to a strike, at the time, at Sharpness, the port of discharge; secondly, that the timber might have been carried ashore and put into railway trucks; or, thirdly, that it might have been rafted. The defendants argued that the port of Gloucester included Sharpness, and set up the strike as a defence; they further contended that it was not customary, and was impracticable, to send the cargo by railway, and that rafting would have spoilt the timber. The learned county court judge was of opinion that the defendants were not in default, except for not doing any work on August 20; but, as no satisfactory explanation had been given for not sending lighters on that day, he held the plaintiffs were entitled to 22*l.* 5*s.* 10*d.* damages, by way of demurrage, for the one day's delay. With reference to the points raised by the plaintiffs and defendants respectively, the learned judge referred to *Nielsen* v. *Wait* (1), and held, on the evidence, that Sharpness is within the port of Gloucester; and he found as facts,—that nothing could have been done towards discharging the vessel until the strike had come to an end;—that, after the strike had come to an end, the defendants, except in one particular, viz., on August 20, did all that could reasonably have been expected to discharge the vessel;—that the plaintiffs gave no evidence that the discharge could have taken place on

(1) 14 Q. B. D. 516; 16 Q. B. D. 67.

to the bank, but that the defendants' evidence satisfied him that this was not a customary mode of discharge, though occasionally timber vessels are discharged at Sharpness on to the bank, and their cargoes are then taken away by railway; but that this is only done when the vessel so discharging has a quay berth, and no quay berth was available for this vessel, she being moored to a buoy in the dock with her stern to the quay wall at one end of the dock, in a place between the lock entrance and a graving dock, which was unfitted for the discharge of cargo, and at which the discharge of cargo is never allowed, and could not be made; —that no evidence was given that rafting was a customary mode of discharge, or that it could have been done with this cargo, and, according to the evidence of one witness, the cargo would have been spoilt by rafting.

The plaintiffs appealed mainly on the ground that, accepting the facts as found by the learned county court judge, an anterior strike of labourers employed to discharge lighters at Gloucester was not within the strike clause, as it only prevented lighters from being discharged at Gloucester, and did not prevent the discharge of the steamer at Sharpness within the meaning of the charterparty.

March 7. *Brynmôr Jones, Q.C.*, and *H. Holman*, for the appellants (plaintiffs).

Aspinall, Q.C., and *Lauriston Batten*, for the respondents (defendants).

The arguments of counsel fully appear from the judgment. In addition to the cases there cited, the following were referred to by the plaintiffs: *Wright* v. *New Zealand Shipping Co.* (1); *Nelson* v. *Dahl* (2); *Postlethwaite* v. *Freeland.* (3)

Counsel for the defendants applied for leave to argue by way of cross-appeal against the judgment for one day's demurrage on the ground that though the defendants might not have any right to originate an appeal, as the amount was under 50*l.*, and the question one of fact, viz., whether the defendants did or did not supply a lighter on a particular day, still as the plaintiffs were

(1) 4 Ex. D. 165.

(2) 6 App. Cas. 38.

(3) 5 App. Cas. 599.

appealing, this amounted to a re-hearing, and therefore the whole question originally at issue ought to be gone into; but the Court refused the application for the reasons given in the concluding portion of the judgment.

On the question of the right of appeal from a county court, the following cases were referred to: *The Falcon* (1); *The Lauretta* (2); *The Hero* (3); *The Eden.* (4)

Cur. adv. vult. (5)

March 22. The judgment of the Divisional Court (the President, Sir F. H. Jeune, and Gorell Barnes, J.) was delivered by

GORELL BARNES, J. In an action brought by the owners of the *Alne Holme* against the charterers of that vessel, to recover 127*l.* 5*s.* 11*d.* for five days twenty-two hours' demurrage, for the alleged detention of the vessel at Sharpness, the learned county court judge gave judgment for the plaintiffs for 22*l.* 5*s.* 10*d.* for only one day's demurrage with costs. The appellants contend that they are entitled to judgment for the whole time claimed.

The claim arises under a charterparty. [The learned judge detailed the contents of the charterparty, and of the findings of the county court judge already set out, and continued:—] We see no reason to take a different view of the facts from that adopted by the learned county court judge, who had the witnesses before him.

The main point urged by counsel for the appellants, was that, even if the facts were taken as found by the learned judge, the case fell within the decisions of *Kay* v. *Field* (6), and *Grant* v. *Coverdale* (7), and that as the strike only prevented lighters from being discharged at Gloucester it did not prevent the discharge of the ship at Sharpness within the meaning of the charterparty.

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(1) 3 P. D. 100.

(2) 4 P. D. 25.

(3) [1891] P. 294.

(4) [1892] P. 67.

(5) No copy of the written judgment of the learned county court judge was forthcoming at the trial, but a copy was furnished to the judges composing the Divisional Court before they delivered judgment. This contained a statement of the findings which have been already set out.

(6) 8 Q. B. D. 594; 10 Q. B. D. 241.

(7) 8 Q. B. D. 600; 11 Q. B. D. 543; 9 App. Cas. 470.

On the other hand, counsel for the respondents argued that the case was one of a similar nature to that of *Hudson* v. *Ede.* (1)

It is unnecessary to discuss at any length the distinction between the two former cases and the latter, because that has been fully done in the judgments of the learned judges of the Court of Appeal, who reversed the decision of Pollock, B., and also in the judgment delivered in the House of Lords in *Grant* v. *Coverdale.* (2) It is sufficient to note that in the two former cases the place of loading was the East Bute Dock, and that there were several distinct modes of loading, one of which was interrupted by frost, and thus affected the particular charterer, but would not have affected most of the shippers who used the East Bute Docks; whereas in the latter case the only way in which cargo could have been brought to the vessel was interrupted by ice. The late Chief Baron Kelly, in delivering judgment in *Hudson* v. *Ede* (1), said: "My brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply;" and Lord Selborne's judgment in *Grant* v. *Coverdale* (2) has the following passage: "The case of *Hudson* v. *Ede* (1) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as, for instance, that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment."

In the present case the only customary mode of discharge of such a cargo as that of the *Alne Holme* was by lighters, in which the timber is lightered to Gloucester, and it is clear to us that the parties contemplated that the discharge should take place in that manner; and, in fact, it was the only possible way in which it could be done. There is no question that the discharge in this manner was delayed by the strike, and for this delay the charterers, in our opinion, are not responsible. It was urged upon us that the vessel might have been sooner discharged at Sharpness; but this could only have been done, if at all, in one of four ways—first, by lighters, which under the circumstances was impossible, owing to the strike; secondly, by rafting; but this, if possible, was not a customary mode of discharging a cargo, and would have spoilt the cargo; thirdly, it was said that it might have been put ashore; but this, again, was not customary, and could not have been done; and, fourthly, that the vessel might have discharged at a quay at Sharpness; but the charter provided that she should be discharged at a dock and berth as might be ordered by the charterers or by their agents, after receiving notice of arrival, or so near thereto as she might safely get, and, if ordered to a quay, there was no quay berth available, and the vessel could not have got to the quay probably without longer delay than she experienced, according to the evidence; and discharge of timber on to the quay was not a customary mode of discharge. In truth, it was never contemplated that she should discharge at a quay berth, and the discharge into lighters was the mode of discharge accepted by both parties.

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(1) Law Rep. 2 Q. B. 566; 3 Q. B. 412.

(2) 8 Q. B. D. 600; 11 Q. B. D. 543; 9 App. Cas. 470.

Applying the principles of the cases cited to the present case, we are of opinion that the loss of time in question was caused by the strike within the meaning of the charterparty, and that the charterers are excused.

A further point was made for the defendants that the clause in this charterparty, "to be discharged with the customary steamer despatch of the port," was substantially the same as that in the case of the *Castlegate Steamship Co.* v. *Dempsey.* (1) In that case the charterparty provided that the cargo was "to be discharged with all despatch as customary, and ten days on demurrage, over and above the said laying days, at 6*d.* per nett register ton per day." By the custom of the port of discharge a dock company undertook the work of discharging cargo, and by reason of a strike of dock labourers the discharge of the cargo was delayed. It was held that the effect of the charterparty was not to fix any definite time within which the cargo must be discharged; but to provide that it should be discharged with all reasonable despatch, having regard to the circumstances and the manner of discharging cargo customary at the port of discharge; and, therefore, that the charterers were not liable to the shipowners in respect of the delay which occurred in discharging the cargo.

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(1) [1892] 1 Q. B. 854.

The language in the charter, in the present case, is slightly different from that in the charter in the case just referred to, and the latter charter had no strike clause. The Master of the Rolls and Lopes, L.J., both point out that in the case before them the dock company did both the shipowners' and charterers' work, though it is suggested that it would have made no difference had it been otherwise. As, however, there is a strike clause in the present case, it is unnecessary to give any decision as to what would have been the case had it been omitted.

The plaintiffs further alleged that after the strike was over the defendants ought to have sent more lighters to the vessel than they did; but the judge has found, as a fact, that after the strike had come to an end they did all that they could reasonably have been expected to do to discharge the vessel, except on one day, the 20th, and there is nothing to shew that he has improperly found this fact.

The appeal must, therefore, be dismissed with costs.

Counsel for the respondents invited us to allow him to prosecute a cross-appeal against the judgment for one day's demurrage; but as the only ground upon which he could question the judgment on this point was admitted by him to depend upon a question of fact, and the amount was under 50*l.*, no appeal against the judgment lies in favour of the defendants. It was said, however, that as the plaintiffs had chosen to bring the case before the Court, the Court had power, upon the plaintiffs' appeal, to alter the judgment adversely to the plaintiffs. No authority was cited for any such proposition; and, as this Court has only an appellate jurisdiction, the only question before it is whether or not the plaintiffs' appeal is to succeed or fail; and we do not consider that we can entertain what is really a cross-appeal by the defendants, when they have no right to originate an appeal.

Appeal dismissed.

Solicitors for plaintiffs: *Downing, Holman, & Co., for Downing & Handcock, Cardiff.*

Solicitors for defendants: *Thorneycroft & Willis, for Taynton, Sons, & Siveter, Gloucester.*

T. L. M.

BOUGHEY AND OTHERS *v.* MINOR.

1893
Feb. 14.

Probate—Practice—Citation—Compromise—Attorney General cited to give his Sanction.

A testator by his will bequeathed the residue of his real and personal estate for the establishment of an agricultural college. The will was disputed by one of his next of kin who was also heiress-at-law; but a compromise was agreed to, by which the will was to be proved in solemn form without opposition. The Attorney General, as interested in the disposal of the residue, was cited, and appeared at the hearing to give his sanction to the compromise.

THOMAS HOOPER ADAMS, late of Newport, in the county of Salop, died June 7, 1892, having duly executed his last will and testament on December 29, 1891. He left his widow and a niece his sole next of kin, and the only persons entitled in distribution; and his niece was also his heiress-at-law. By his will, after making certain bequests for the benefit of his widow, he devised the residue of his real and personal estate to the plaintiffs, his executors, in trust for the foundation of a school or college for the teaching of practical and theoretical agriculture, including housekeeping and dairy farming. There was no bequest to the testator's niece, the defendant, although a considerable portion of testator's property came from her father and mother. When the will was propounded by the executors, the plaintiffs, the defendant, the testator's niece and heiress-at-law, opposed it on the ground of testamentary incapacity; but, after negotiations, an arrangement was made by which the will was to be proved in solemn form without opposition, and the trustees were to convey to the defendant the real estate formerly belonging to her mother, and to pay the costs. The Attorney General, as interested in the settlement of a scheme for the disposal of the residue, was cited to see proceedings.

Inderwick, Q.C. (*R. H. Pritchard,* with him), for the plaintiffs, after evidence had been given of due execution, &c., moved for probate of the will.

Bayford, Q.C. (*Searle,* with him), for the defendant, consented.

The *Attorney General* (*Sutton,* with him) appeared to sanction the compromise.

THE PRESIDENT. The defendant seems to have a strong claim, and I am not surprised that the Attorney General should give his sanction to an arrangement which recognises her claim, and makes provision for it. The Attorney General has exercised his discretion, and I have no hesitation in saying that the arrangement is a proper one. As far as it is necessary for me to give my sanction to the arrangement, I give it, and I grant probate of the will.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendant: *W. & J. Flower & Nussey.*
Solicitor for Attorney General: *Sir A. Stephenson.*

W. L.

IN THE GOODS OF GILBERT.

1893
March 14.

Probate—Will and Codicils—Practice—Writing on back of Codicil—Blank piece of paper pasted over Codicil—Order for Removal.

A testatrix left a will and two codicils duly executed. She had made various alterations in the codicils, and among others she had written some words at the back of the first codicil, and had subsequently pasted a piece of blank paper over them.

The Court made an order that the paper should be removed, in order to ascertain what the words were.

MARY ANNE MOSS GILBERT, late of Bath, on August 7, 1866, duly executed a will, of which she appointed her son the sole executor. On April 29, 1869, she made a codicil revoking certain trusts, and substituting other trusts in their place. On August 27, 1869, she made a second codicil redeclaring certain trusts in the first codicil and omitting other trusts; and it appeared that on August 24 she struck her pen through her signature to the first codicil, and wrote underneath these words: "I cancel this codicil to my will as far as regards the 1000*l.* to each of my daughters, and I wish them to have 500*l.* instead." Subsequently she wrote something on the back of her first codicil, and at a later date pasted a piece of blank paper over it. The testatrix died January 8, 1879, and probate in common form of the will and two codicils was taken out by the executor.

Inderwick, Q.C. (*Deane*, with him), moved the Court to make an order for the removal of the blank piece of paper in order to ascertain whether what had been written by the testatrix amounted to a revocation of the codicil.

THE PRESIDENT. I see no objection to that, and I make the order.

Solicitors: *Cooper & Bake.*

W. L.

1893
March 14.

IN THE GOODS OF ALLEN.

Probate—Administration with Will annexed—Two Wills—No Executor named in Second—Wife sole Beneficiary—Grant to Wife—Securities dispensed with—Personal Bond only required.

A testator having duly executed a will placed it among his papers, and being unable to find it subsequently executed a second will. By both wills he made his wife his universal legatee, and in his first will he appointed her his sole executrix; but in the second will he made no appointment of executrix:—

Held, on a motion for probate of both wills that administration ought to be granted to the widow, with the last will annexed, but that she might give her personal bond without being required to find securities.

THOMAS ALLEN, deceased, duly executed a will on January 14, 1884, by which he bequeathed all the real and personal estate of which he might die possessed to his wife, and appointed her his sole executrix. The will when executed was placed among his papers, but shortly afterwards when he looked for it there he was not able to find it, and in November of the same year he made a second will, which was identical with the missing will except that it contained no appointment of executrix.

The testator died on December 31, 1891, and shortly after his death his widow, looking through his papers, found the missing will. The testator's estate was about £300 in value, and the debts were under £20.

Deane, now moved for probate of both papers as together containing the last will of the deceased. The disposing part of both wills is the same, and the widow would be entitled to a grant of administration; but by taking as an executrix she will not be obliged to find securities.

THE PRESIDENT. The best course will be to grant administration with the last will annexed to the widow. Securities may be dispensed with, and it will be sufficient if she gives her personal bond.

Solicitors: *Nield & Strouts.*

W. L.

BUTLER *v.* BUTLER (THE QUEEN'S PROCTOR INTERVENING).

1893
March 14.

Divorce—Queen's Proctor's Intervention—Previous Findings of Adultery, Cruelty, and Collusion against the Petitioner—Res adjudicatæ—Estoppel—Discretion—20 & 21 *Vict. c.* 85, *s.* 30.

Upon an intervention by the Queen's Proctor for the purpose of shewing cause against a decree nisi obtained by a husband in a petition for divorce on the ground of his wife's adultery, it appeared that at a trial of cross-petitions previously presented by the husband and wife against each other, it had been arranged that the husband should submit to a decree nisi being pronounced on the ground of his adultery and cruelty, and should withdraw his petition against his wife. It also appeared that on an intervention by the Queen's Proctor to rescind such decree nisi on the ground of collusion, suppression of material facts, and the wife's adultery, the jury had found that there had been collusion and suppression of material facts, but were unable to agree as to the wife's adultery, whereupon the decree nisi was rescinded and the petition dismissed.

The Queen's Proctor in the present intervention pleaded that the findings of the juries at the former trials operated as an estoppel against the husband in the present petition, and that the adultery, cruelty, and collusion found against him were res adjudicatæ which disentitled him to relief:—

Held, on motion of the Queen's Proctor to dismiss the petition, that though the previous findings must be taken as conclusive evidence that the petitioner had been guilty of adultery, cruelty, and collusion, they did not amount to an estoppel, and that it would be open to the petitioner at the trial of the issues raised by the present intervention to shew that the collusion was not in regard to the present petition, and that the circumstances were such as to induce the Court to grant relief notwithstanding the findings of adultery and cruelty.

MOTION of Queen's Proctor to dismiss a petition by a husband for divorce on the ground of his wife's adultery.

It appeared that in 1888 the husband and wife presented cross-petitions, praying for a divorce. The petitions were tried before Butt, J., and a common jury in June, 1888. On the second day of the trial it was intimated to the Court that by agreement between the parties certain charges of adultery against the husband would be withdrawn, and one charge only would be insisted on, and that the husband's petition against his wife would be withdrawn.

The jury having heard the evidence in the wife's petition, found that the husband, the respondent, had been guilty of adultery and cruelty, and that the petitioner had not been guilty of adultery, and Butt, J., on June 25, pronounced a decree nisi.

Subsequently the Queen's Proctor intervened alleging collusion, the suppression of material facts, and the commission of adultery by Mrs. Butler. These issues were tried before Butt, J., and a common jury on April 10, 1889, and the jury found that there had been collusion, and that material facts had been kept from the knowledge of the Court; but on the issue of Mrs. Butler's adultery they were unable to agree. Upon these findings Butt, J., rescinded the decree nisi, and his decision was confirmed by the Court of Appeal on August 10, 1889.

On April 7, 1891, the husband presented a second, the present, petition for dissolution on the ground of his wife's adultery with some person unknown. The wife did not appear in the petition, and on December 19, 1891, the jury at the trial found that she had been guilty of adultery, and the President pronounced a decree nisi.

Subsequently the Queen's Proctor intervened, and filed a petition shewing cause against the decree nisi, in which he pleaded that the findings of the jury on June 25, 1888, and April 10, 1889, and the judgment of the Court on August 10, 1889, were an estoppel to the prayer of the present petition. That though by leave of the Court the present petitioner was allowed to proceed without making a co-respondent, the adultery alleged was identical with the adultery in the former suit, and was supported by evidence which was in the possession of the petitioner, or attainable by him, and could have been produced by him at the time of the first trial. The Queen's Proctor further alleged that the petitioner had been found guilty of adultery, cruelty, and collusion, and that these were res adjudicatæ, and alternatively that his adultery and cruelty were as set out in the wife's petition.

The petitioner, in his answer to the Queen's Proctor, pleaded that all material facts had been brought to the knowledge of the Court, that when he obtained leave to proceed with his second petition without making a co-respondent, the Queen's Proctor was represented and was therefore estopped from shewing cause. That the findings of the juries in respect of the petitioner were brought about by mistake, by the suppression of material facts and by perjury, and were not binding on the petitioner; that the collusion, if any, was in respect of the previous suits and unintentional; that the adultery charged in the present petition was not identical with the adultery charged in the former petitions, and that the adultery, cruelty, and collusion charged were not res adjudicatæ.

Lockwood, Q.C. (*Jacques,* with him), on behalf of the Queen's Proctor. The petitioner in the former suit has been proved guilty of collusion with his wife in respect of the same adultery which is charged in the present petition, and inasmuch as there is a finding of a jury that the petitioner has committed adultery and cruelty, that finding is a bar to his obtaining relief in this Court. The question of collusion is dealt with in s. 30 of the Matrimonial Causes Act of 1857, which requires the Court to dismiss the petition, if it finds that it has been presented and prosecuted in collusion with the respondent. Collusion was found in regard to the first suit at the trial of the intervention, when the petitioner might have produced any evidence on which he may now rely in disproof of the charge, and the fact that he was found guilty of collusion in the first suit affects his position whenever he revives his charge of adultery against his wife. The collusion still constitutes a bar, an absolute not a discretionary bar, which is not terminated by the dismissal of the first suit. As to the adultery, the Queen's Proctor is entitled to rely upon the findings of the previous jury as an answer to this suit. That finding does not cease to be operative, because the decree nisi has been rescinded. It remains valid as between the parties, and it acts as an estoppel in the present petition. It is conclusive evidence that the petitioner has been guilty of adultery. His proper remedy would have been to move for a new trial.

[He referred to *Conradi* v. *Conradi.* (1)]

Inderwick, Q.C. (*R. H. Pritchard,* with him), for the petitioner. It may be that the evidence in the former suit is conclusive evidence that the petitioner has committed adultery, but that will not prevent him from contending that the Court upon reviewing the circumstances may grant him relief, although he has been guilty of adultery. The question is a matter to be dealt with at the trial, and not upon an application to dismiss the petition: *Conradi* v. *Conradi* (2). The pleadings raise the issue that the former finding was obtained by mistake, and the petitioner is entitled to give evidence with regard to his adultery to shew that the case is one in which the Court may fitly exercise its discretion. Collusion to operate as an absolute bar, must be in reference to the present petition. Collusion differs from connivance in that respect. Collusion may consist in the suppression of material facts, and there has been no finding that there was suppression of material facts in regard to this petition. The argument on the other side only amounts to this, that the former petition was presented in collusion with the respondent; but unless it can be shewn that the present petition relates to the same charge of adultery, it cannot be said that this petition was presented in collusion with the respondent. With regard to the other facts, it is stated that the collusion, if any, was unintentional on the part of the petitioner, and brought about by the fraud and misrepresentation of the respondent.

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(1) Law Rep. 1 P. & D. 514.

(2) Law Rep. 1 P. & D. 393.

Lockwood, Q.C., in reply. The contention of the petitioner amounts to this that when the Queen's Proctor appears at the trial he will not be called upon to tender any evidence as to the adultery and cruelty of the husband. It will be enough for him to rely on the adultery and cruelty found in the former trial; but it will be open to the husband to give such explanation of such adultery and cruelty as he thinks may induce the Court not to withhold relief from him.

THE PRESIDENT. There is no question of estoppel, but collusion in the former suit was found as a fact, and adultery and cruelty were found as facts, and these findings I am bound by *Conradi* v. *Conradi* (1) to regard as conclusive. It will, however, be open to the petitioner to shew at the trial that such collusion was not in regard to this petition, and in respect to the adultery and cruelty it will be open to him to shew that there were surrounding circumstances which may induce the Court not to withhold the relief which he asks. The subject-matter of the trial will be limited in the manner in which Mr. Lockwood has correctly defined it.

Solicitors for petitioner: *Fox & Joy*.

(1) Law Rep. 1 P. & D. 514.

W. L.

THE BRIGELLA.

1893
March 22;
April 18.

Admiralty—Marine Insurance—Chartered Homeward Freight—Foreign Statement Clause—General Average.

The plaintiffs, who were owners of a vessel chartered to proceed to a port in the United States, as ordered at port of call, and there load a cargo for the United Kingdom or Continent, and deliver the same on being paid the agreed freight, effected with the defendant an insurance on "chartered homeward freight," the voyage being described in the policy as from Liverpool to Delaware Breakwater, and thence to New York or one other named port, and thence to any port in the United Kingdom or Continent within named limits, and general average was to be payable "as per foreign statement if required."

The plaintiffs' vessel left Liverpool in ballast, under the above charter, and two days afterwards, in consequence of heavy weather causing her tanks to leak, put into Holyhead without incurring expense in so doing; but at that place some expense was incurred, and, three days later, she returned to Liverpool, where further expenses were incurred in repairs, but none of the items of expenditure at Holyhead or Liverpool were incurred for the preservation of ship and freight. The vessel then sailed for Delaware Breakwater, where she received orders for Baltimore, to which port she proceeded, and there loaded, under the charter, a cargo which she delivered at Barrow. By an average statement, prepared in London, according to the alleged provisions of American law, general average charges in respect of the expenses incurred in Holyhead and Liverpool were shewn amounting to 186*l.* 6*s.* 5*d.*, including a sum of 154*l.* 3*s.* 8*d.* for wages and victualling of the crew whilst the vessel was at Holyhead and Liverpool. By the statement, the ship was made to bear 164*l.* 9*s.* 10*d.* of these charges, and the chartered freight (valued for the purposes of contribution at 1526*l.*) was made to bear 21*l.* 16*s.* 7*d.* In respect of the defendant's proportion (11*l.* 16*s.* 4*d.*) of this latter sum, the plaintiffs brought their action, alleging that a general average loss had arisen, which had been properly adjusted according to American law, and that the plaintiffs must be treated as having contributed to the loss on the basis of the statement:—

Held, that, as the ship was under charter outward bound in ballast to load for the return voyage, and the only persons interested in the ship, and chartered freight, were the shipowners, the expenses in question were not a general average loss for which the defendant could be liable under the policy on chartered homeward freight, and, as there was no necessity for any foreign adjustment, the "foreign statement" clause had no effect.

HEARING, on point of law, arising in an action to recover an alleged general average loss upon a policy on chartered homeward freight of the British steamship *Brigella*.

The plaintiffs were J. Temperley & Co., and others, owners of

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the *Brigella*; the defendant was D. C. Mackinnon, an underwriter at Lloyd's.

The facts (which were not in dispute), were shortly that:—

On August 22, 1891, the plaintiffs, through their agents at Baltimore, entered into a charterparty with J. M. Parr & Son, under which the *Brigella*, described as then trading, being tight, staunch, and strong, and in every way fitted for the voyage, with liberty to take outward cargo to a port or ports in the United States for owners' benefit (a provision of which the owners did not avail themselves), was with all convenient speed to sail and proceed to Baltimore, New York, Philadelphia, or Newport News, one port only as ordered by charterers upon arrival in the United States at port of call, if in ballast, and there load, from the charterers or their agents, a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ Indian corn, and, being so loaded, proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom or on the Continent between Bordeaux and Hamburg, and deliver the same on being paid freight at certain specified rates. The charter provided that freight as per bills of lading should be taken without deduction in payment of the charter, any deficiency to be paid at port of loading in cash, less insurance, and any surplus over and above estimated charter to be settled there, before the vessel cleared at the custom-house, by captain's draft in charterers' favour upon consignee payable five days after arrival at port of discharge, and that charterers' liability under the charter should cease on cargo being shipped, but the vessel to have a lien thereon for all freight, dead freight, demurrage, or average. From these provisions it followed that, upon completion of the loading and adjustment of the freight, the charterer ceased to have any practical concern in the voyage.

On August 24, the plaintiffs insured with the defendant, and other underwriters, 1180*l.* on "chartered homeward freight," valued at 2180*l.*, the voyage of the *Brigella* being described in the usual Lloyd's printed policy as from Liverpool to Delaware Breakwater, and thence to New York, Baltimore, Philadelphia, or Newport News, and thence to any port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in any order in the United Kingdom $\frac{\text{and}}{\text{or}}$ on the Continent within the same limits as those fixed in the charter.

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The policy contained the usual suing and labouring clause, and provided that general average and salvage charges should be payable "as per foreign statement, if required, or per York Antwerp Rules if in accordance with the contract of affreightment"; but the charterparty did not refer to these rules.

The *Brigella* was at Liverpool at the time of the making of the charterparty, and on August 24 she left that port, under the charter, in ballast for Delaware Breakwater, the port of call for orders in the United States. Meeting with heavy weather, her ballast tanks began to leak, and she put into Holyhead on August 26, where certain expenses were incurred, and on August 29 she left Holyhead and put back to Liverpool, where she arrived the same day, and where further expenses were incurred in effecting repairs to her tanks, and in shifting coal to get at them.

The vessel sailed again on September 16, and at Delaware Breakwater received orders for Baltimore, to which port she proceeded. She there loaded a cargo under the charterparty, which she delivered at Barrow.

On March 9, 1892, an average statement was prepared in London, according to the alleged provisions of American law, and:—

Of the total expenses at Holyhead, amounting to 33*l.* 19*s.* 6*d.*, 10*l.* 16*s.* 1*d.* was carried into the general average column. The items consisted of proportion of captain's postages, telegrams, and hotel expenses, 8*s.* 10*d.*; boat hire, 1*l.* 10*s.*; extra dock pilotage, 2*l.*; gratuity to foreman, 1*l.*; telegram and postages, 6*s.* 3*d.*; sustenance for surveyors, pilots, &c., 10*s.*; cab, train, and ferry hire, 12*s.* 6*d.*; master's expenses, 1*l.* 2*s.* 6*d.*; gratuities to dockmen, customs, and shipping official, 1*l.* 10*s.*; permits, labourers, and refreshments, 1*l.* 16*s.*

Of the expenses at Liverpool the items carried into the general average column were: proportion of petty expenses and telegrams, 1*l.* 1*s.*; agency, 2*l.* 12*s.* 6*d.*; wages and victualling of crew while vessel under repair (August 25 to September 16), twenty-two days, 154*l.* 3*s.* 8*d.*; owners' expenses attending vessel under repair, 7*l.*; telegrams, 1*l.* 4*s.* 2*d.*; average statement, 9*l.* 9*s.*

These items made up a total of 186*l.* 6*s.* 5*d.*, of which the ship was made to bear 164*l.* 9*s.* 10*d.*, and the chartered freight, valued for the purposes of contribution at 1526*l.* (being the gross freight less contingent expenses, that is, the cost of earning it if the vessel had been lost), was made to bear 21*l.* 16*s.* 7*d.*, of which the proportion under the policy signed by the defendant was 11*l.* 16*s.* 4*d.*, the sum claimed in the action.

March 22. According to agreement between the parties the case was argued on a joint admission of facts referring to the charterparty, policy, and average statement.

F. Laing, for the plaintiffs.

Hurst, and *Bingley*, for the defendant.

The arguments of counsel appear from the judgment, and may be shortly summarized thus: For the plaintiffs it was contended:—first, that a general average loss had arisen, which ought to be contributed to by the chartered freight; secondly, that although the plaintiffs alone were interested in ship and freight, their claim on the underwriters on freight was to be treated as if the plaintiffs had contributed in general average to the losses in question; thirdly, that the place of adjustment was America, and that the contract being to pay general average, as per foreign statement if required, the plaintiffs were entitled to recover on the basis of the average statement.

For the defendant it was contended that, if there was any average loss, the statement should have been made up according to English law, as Barrow was the ship's destination and port of discharge; secondly, that chartered freight did not contribute to general average under the circumstances of this case; and, thirdly, that, even according to American law, the item for wages and victualling of the crew would be excluded from general average.

[In addition to the cases and text-books mentioned in the judgment, counsel for the plaintiffs referred to the following:—On the question of chartered freight contributing if at risk, and as to the practice to treat the interests in the same hand as separate: Lowndes on General Average, 4th ed. p. 310 to 316;

Williams v. *London Assurance Company* (1); Abbott on Shipping, 13th ed. p. 658. As to American law, Parsons on Shipping, 1869 ed. vol. i. p. 452; and the references to Parsons and Phillips in the notes to *Walthew* v. *Mavrojani.* (2) As to the proper place of adjustment: *Fletcher* v. *Alexander* (3); *Hill* v. *Wilson.* (4)

Counsel for the defendant, on the question of the final port of destination being the place of adjustment, referred to Phillips on Insurance, s. ix. sub-s. 1375. On the non-liability of a policy on homeward freight to contribution for general average on the outward voyage: Arnould on Marine Insurance, 6th ed. vol. ii. p. 906; and the remarks of Willes, J., in delivering the judgment of the Court in *Potter* v. *Rankin.* (5)]

Cur. adv. vult.

April 18. GORELL BARNES, J. [The learned judge stated the nature of the case, the facts, the contents of the charterparty and policy, and the items charged to general average, and continued :—]

The vessel appears to have been taken to a place of safety in the port of Holyhead without incurring any expense in so doing, and it will be seen that none of the items of expenditure at Holyhead or Liverpool appear to have been incurred for the preservation of the ship and freight; they all relate to matters occurring after the risk to the vessel had ceased, and to have been incurred to repair the vessel, or owing to the delay during repairs. It was practically conceded in argument that they were not of the nature of general average sacrifice or expenditure, according to English law, and the vessel having put into port to repair particular average loss only, it was not contended that, according to that law, the wages and provisions of the crew at Liverpool would be treated as general average loss, or be in any way borne by the underwriters.

[The learned judge then referred to the heads of the arguments of counsel, and observed :—]

In the course of their arguments, counsel referred to a number of cases and passages from text-writers; but when they are examined there is, with two exceptions, not much to be found in them bearing directly upon the real question in this case; and in order to arrive at a decision thereon, it is necessary to consider the principles to be applied in solving it, and several important cases besides those referred to in argument, which indirectly assist in doing so.

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(1) 1 M. & S. 318.

(2) Law Rep. 5 Ex. 116.

(3) Law Rep. 3 C. P. 375.

(4) 4 C. P. D. 329, at p. 332.

(5) Law Rep. 3 C. P. 562.

I understand the plaintiffs' points to be intended to establish that a general average loss has arisen; that it has been properly adjusted according to American law, by a statement which satisfies the term a "foreign statement" in the policy; and that the plaintiffs must be treated as having contributed to the loss, on the basis of that statement.

Some of the authorities cited bear upon the general question of the liability of chartered freight to contribute in general average where there are really different contributory interests in respect of ship and cargo; but it is unnecessary, in my opinion, to embark upon this general question.

The real question in the case is whether or not, where a ship is proceeding in ballast to her loading port under or in pursuance of her charter, and the only persons interested in the ship and chartered freight are the shipowners, there can be any general average loss for which the underwriters are liable under a policy on chartered freight containing the "foreign statement" clause. I will first consider the matter apart from that clause.

Numerous definitions of a general average loss have been given; but I need only refer to that of Lawrence, J.; in his often-quoted judgment in *Birkley* v. *Presgrave* (1), where he says: "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested." See also the judgments in *Svendsen* v. *Wallace*. (2)

There is involved in this statement the loss sustained by one or some for the benefit of all, and the liability of all to contribute thereto.

This liability to contribute is as old as the Rhodian law, the

(1) 1 East, 220, at p. 228.

(2) 13 Q. B. D. 69; 10 App. Cas. 404.

text of which, as given in the Digest of Justinian (1), is so well known. The rule of English law is stated by Lord Tenterden, then Abbott, C.J., in *Simonds* v. *White* (2), in the following terms: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract; but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle." Bramwell, L.J., in *Wright* v. *Marwood* (3), seemed to think that the liability to contribute arose from an implied contract inter se to contribute "by those interested." But the Master of the Rolls thought, in *Burton* v. *English* (4), that it did not arise from any contract at all, but from the old Rhodian laws, and had become incorporated into the law of England as the law of the ocean. He adds (5): "It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." Bowen, L.J., in the same case, says (6), that although legally it may be a sound way of looking at it as arising out of implied contract, he considers, nevertheless, this as technical, and that the claim for average contribution, at all events, is part of the law of the sea.

Whichever way it is looked at, the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not. The circumstance of a party being insured can have no influence upon the adjustment of general average, the rules of which, as I have in effect shewn above, are entirely independent of insurance.

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(1) Dig. xiv. ii. 1.
(2) 2 B. & C. 805, at p. 811.
(3) 7 Q. B. D. 62, at p. 67.
(4) 12 Q. B. D. 218, at p. 220.
(5) 12 Q. B. D. 218, at p. 221.
(6) 12 Q. B. D. 218, at p. 223.

If a contributing party is insured he can claim an indemnity against his underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. I do not forget that in some cases an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to recover contribution from the various contributories, and, subject to certain differences of values, the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them—see *Dickenson* v. *Jardine* (1)—and this exception does not affect the question I am considering. The contribution is based on the benefit derived from the sacrifice by each interest—in other words, on the values saved, and in the case of freight, this is the amount of freight at risk, minus the expenses of earning it which would have been saved if the ship had been lost.

This nett amount of freight is not the amount of freight which the underwriters on freight would have to pay if the ship had been lost, because they would have to pay the gross amount insured without deducting any cost of earning it, which would have been saved if the ship had been lost.

Now, the interests at risk in the present case are the ship and the chartered freight, and these interests belong to the plaintiffs. All that is said in the cases I have referred to, and that I have said about general average and contribution, seems utterly inapplicable to such a case. There is no contract to contribute, nor any law of the sea affecting the matter. If the plaintiffs were not insured they would simply bear their own loss. No adjustment would be required, nor would any question of contribution arise, and there would be no general average, properly speaking. If, however, the plaintiffs had insured all their interests in one policy, expenses properly incurred in averting a loss of those interests imperilled by a peril insured against would fall to be borne by the underwriters under the sue and labour clause.

If they had insured the ship in one policy, and the freight

(1) Law Rep. 3 C. P. 639.

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in another, it follows that the underwriters on the respective policies should bear expenses of averting a loss of those interests in proportion, not to the actual values saved, but to the benefits derived by the underwriters from the averting of the loss—that is to say, in proportion to the amounts insured by them respectively. (See Benecke on Marine Insurance, pp. 322 and 323.)

I have already pointed out that in the present case there were no expenses incurred to avert a loss of the joint interests, but only certain expenses incurred in order to repair the ship, or owing to the delay in effecting those repairs. There was no general average loss, or even any loss or expenditure common to both interests. There was no necessity for any general average adjustment, and no question as to any place of adjustment.

The plaintiffs' propositions involve the suggestion that when one person only is interested in the subject-matters at risk, and insures them separately, the underwriters on each interest separately insured must be considered as consenting to deal with the assured as if the other interests belonged to different persons. But I can see no foundation for this in an ordinary policy such as that before me, or in fact. It is inconsistent with the notion of a contract of indemnity, and with the principles which I have considered above. The plaintiffs, however, supported this suggestion by referring to two cases: *Moran* v. *Jones* (1) and *Oppenheim* v. *Fry*. (2)

The actual decision in *Moran* v. *Jones* (1), (which case has since been commented on), was that the expenses there in question were general average, to which ship, freight, and cargo were to contribute. There are some expressions in Lord Campbell's judgment from which it might be inferred that he thought that where there was no cargo on board, and the ship and freight belonged to the same person, there might be a general average loss, but I doubt whether he really meant to say more than that the underwriters on ship and freight would have to contribute to a sacrifice incurred to avert a total loss of ship and freight in proportion to the benefit they derived from the sacrifice.

In *Oppenheim* v. *Fry* (2) there was a policy on a steamer, the

(1) 7 E. & B. 523.

(2) 3 B. & S. 873; 5 B. & S. 348.

hull and machinery being separately valued, with a clause "average payable on the whole or on each as if separately insured." The steamer had discharged her cargo at Constantinople, and while she lay there without any cargo on board, her hull was damaged by fire, but not her machinery. The cost of the repairs did not amount to 3 per cent. on the insured value of the hull, but an additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire to preserve the hull from total destruction. It was proposed to add the whole of this to the cost of repairs, so as to take the case out of the common 3 per cent. memorandum. The action was for a particular average loss on hull, and the decision was that, however the expenses were considered, the plaintiffs could not add the whole of them to the cost of repairs to make up a sum exceeding 3 per cent. of the insured value of hull, but that they must be apportioned between the hull and the machinery. All that was held in both Courts was that the expenses ought to be apportioned partly to the hull and partly to the machinery; and as when this was done the cost of repairs, plus the portion of the said expenses apportioned to hull, did not come to 3 per cent. on the insured value of the hull, the verdict for the defendant was allowed to stand. The judges in the Queen's Bench considered it not necessary to decide whether the expenses, amounting to 55*l.* 5*s.* 10*d.*, were general average; and in the Exchequer Chamber no reference to general average appears in the judgment. Moreover, I do not find that the attention of the Courts was directed to the sue and labour clause.

The judgment (1) of Lord (then Mr. Justice) Blackburn was especially referred to by the plaintiff's counsel; but the learned judge said it was not necessary for the decision of the case to say whether the expenditure was general average or not, and in the rest of his remarks I do not think the distinction between general average, properly speaking, and an apportionment of expenses on the insured values as between an assured who had all the interests and who insured them separately, and his different underwriters, was presented to the learned judge's mind, nor is the sue and labour clause referred to by him. The case was an attempt to treat the whole expense of saving both interests from loss, as particular average on one alone, namely, the ship, whereas the expenses were sue and labour charges properly apportionable as between the shipowners and their underwriters over the interests benefited: see *Kidston* v. *Empire Marine Insurance Co.* (1)

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(1) 3 B. & S. 873, at p. 884.

In the American case of *Potter* v. *Ocean Insurance Co.* (2), Story, J., considered the underwriters, who insured different interests belonging to one person, who owned all the interests, as being in the same position, with regard to general average, as if they had really been different contributories; but I notice that he speaks of the loss as being "in the nature of general average," and he illustrates his argument by the case of an empty ship which is dismasted in a storm and compelled to put into port to repair, or otherwise she must be abandoned at sea, and asks: "Are not the expenses of the voyage in such a case to the port of necessity of the nature of a general average? Are they not incurred as much for the benefit of the underwriters as for the shipowner?"

These expenses, for the reasons I have given above, are not in my opinion general average; but the underwriters on ship may be made liable for such of them as are incurred to avert loss, on the grounds I have before stated. Unless, therefore, the clause, "General average, payable as per foreign statement if required," alters the case, there was no loss on the freight policy.

The object of this clause was fully considered in *Harris* v. *Scaramanga* (3), where it was held upon a policy on goods which contained the clause, "To pay general average as per foreign statement if so made up," that English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made, and that they are so bound although the contributions are apportioned between the different interests in a manner different from the English mode, or although matters are brought into or omitted from general average, which would not be so treated in England. (4) The present Master of the Rolls, in the course of his judgment,

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(1) Law Rep. 1 C. P. 535; 2 C. P. 357.

(2) 3 Sumner, 27.

(3) Law Rep. 7 C. P. 481.

(4) Law Rep. 7 C. P. 481, at p. 495.

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refers to the diversities which may arise if this clause be not inserted, as pointed out in 2 Phillips on Insurance, § 1414, and says (1): "It seems to me that the only way to give effect to the marginal provision in this case, and an effect as against the underwriter who has by it taken upon himself some real substantial obligation different from his ordinary obligation, is, to say that it was intended to meet this recognised diversity, and to oblige the underwriter to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution."

This clause, then, makes the underwriter liable to pay on the same basis as that on which the contributories have been compelled to pay under an adjustment made up at a foreign port in accordance with the law of that port, and the statement referred to in the clause is a foreign statement which has been necessarily and properly prepared in order to adjust the rights and liabilities of contributories—that is, the amounts to be contributed by the various parties interested in an adventure for the purpose of enabling those parties to settle with each other at the foreign port at which the adjustment should be made, although possibly it is immaterial whether that statement is in fact made up by an adjuster residing at the foreign port or in England, provided it is in accordance with the law of the foreign port, where the adjustment ought, according to the circumstances of the case, to be made.

But in my opinion the clause has no relation to a case like the present, where there has been no necessity for any foreign adjustment nor any compulsion to pay general average according to foreign law, nor any contribution in fact in general average.

The statement before me was merely prepared in order that the plaintiffs might claim upon their underwriters, and it is not based upon the true benefit derived by the underwriters from the alleged losses, for it is based on actual values, and not on insured values. It is based on a supposed contribution, which has no foundation in fact, and which the plaintiffs' counsel admitted was a fiction.

(1) Law Rep. 7 C. P. 481, at p. 498.

Adjustments are made at the port of destination, or where the voyage is broken up, because of the necessity for an adjustment at the place where the interests separate, and at a time when the master can compel the contributories to pay or secure the amounts to be contributed before he parts with the goods and gives up his lien upon them.

There is no reason in principle, nor of necessity, nor even of convenience, why the claim on the underwriters in this case should be made up upon an American, rather than upon an English, basis.

The claim is in respect of expenditure made in England, and not in respect of any sacrifice of subject-matters of insurance. The reason why the plaintiffs prefer the American basis is that, if it can be supported, they will recover from their underwriters for the wages and provisions of the crew which it was admitted would not be allowed in this case in England.

I notice that the statement is only "alleged" to be made up according to American law, and, after referring to the American works on general average, I doubt whether according to that law the expenses in question would in the present case be adjusted as a general average loss. I think the admission in this case means little if anything more than that, according to American law, wages and provisions of the crew from the time a vessel bears away for a port of repairs are allowed in general average, provided that it is necessary for the safety of the ship, cargo and freight alike, that the repairs should be made, whether the injury which created the necessity for them was itself caused by a general average act or by a peril excepted in the contract of carriage.

I am therefore of opinion that the plaintiffs' claim fails and that the defendant is entitled to judgment with costs. (1)

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendant: *Pritchard & Sons.*

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(1) The costs were dealt with on a certain scale agreed upon between the parties.

T. L. M.

1892
Dec. 14.
1893
Jan. 23;
Feb. 1, 21;
April 21.

THE WALTER D. WALLET.

Admiralty—Ship—Wrongful Arrest—Crassa Negligentia—Mala fides—Damages.

Proof of actual damage is not necessary to sustain an action in a court of Admiralty for wrongful arrest, if the seizure of the vessel was the result of *mala fides*, or *crassa negligentia* implying malice.

Semble, an action lies at common law for malicious arrest of a ship by Admiralty process.

Action for damages for breach of contract to transfer the ship *Walter D. Wallet* to the plaintiffs, and, alternatively, for trespass upon, and wrongful arrest of, the said ship by the defendants.

The case is reported only on the question as to the right to nominal damages for the wrongful arrest of the vessel by the defendants, although no actual damage was proved to have been sustained by the plaintiffs.

On December 14, 1892, the case came before the President (Sir Francis H. Jeune) and a special jury; but, after the opening speech of counsel for the plaintiffs, the jury were, by consent, discharged, and the case reserved for further consideration before the judge alone.

1893. Jan 23; Feb. 1. *Dickens, Q.C.*, and *Hugh F. Boyd,* for the plaintiffs.

Sir Walter Phillimore, and *Maurice Hill,* for the defendants.

The facts and the arguments of counsel fully appear from the judgment. In addition to the cases mentioned therein, the following were cited by counsel for the plaintiffs. On the question of the right to exemplary damages for the arrest: *Emblen* v. *Myers* (1); *Ashby* v. *White.* (2) As to an action for malicious prosecution at common law: *Reed* v. *Taylor* (3); *Ellis* v. *Abrahams* (4); *Delisser* v. *Towne.* (5) As to the action lying though indictment bad: *Wicks* v. *Fentham* (6); *Chambers* v. *Robinscn.* (7)

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(1) 6 H. & N. 54; 30 L. J. (Ex.) (N.S.) 71.

(2) Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268.

(3) 4 Taunt. 616.

(4) 8 Q. B. 709.

(5) 1 Q. B. 333, at p. 343.

(6) 4 T. R. 247.

(7) 2 Str. 691.

As to the relief afforded in Admiralty: *The Keroula.* (1) By counsel for the defendants, as to the necessity for the plaintiff to have been injured or put to expense: *Jenings* v. *Florence.* (2) As to the necessity for want of probable cause: *Johnstone* v. *Sutton.* (3) As to want of reasonable and probable cause being for the judge: 2 Roscoe's Nisi Prius, 884; Bullen & Leake's Precedents of Pleading, 3rd ed. p. 350. As to the inference of malice being for the jury on the facts proved, and not arising merely from want of probable cause: *Mitchell* v. *Jenkins.* (4) As to the injury not being of a character for which damages are awarded in a Court of Admiralty: *The Newport.* (5) As to a court of Admiralty only giving actual damages and expenses incurred: *The Nautilus.* (6) As to a mortgagee not in possession being unable to maintain an action of restraint: *The Innisfallen.* (7) As to a mortgagee's right to take possession: 1 Maude & Pollock's Law of Merchant Shipping, p. 61.

Cur. adv. vult.

Feb. 21. THE PRESIDENT (SIR FRANCIS H. JEUNE). This action was brought by Messrs. Compton, Ullstrom & Co. against Messrs. Ross & Co. Three causes of action were put forward in the statement of claim. First, the plaintiffs alleged a breach of contract by the defendants, in respect of a failure by the defendants to transfer the *Walter D. Wallet* to them, in accordance with an agreement of sale. Secondly, the plaintiffs alleged a trespass by the defendants on the *Walter D. Wallet.* Thirdly, the plaintiffs alleged a wrongful arrest of the *Walter D. Wallet,* caused by the defendants.

The first of these causes of action was given up at the hearing. Clearly, the second cannot be maintained. It is with the third that I have to deal.

In the view I take of the case the facts to be stated are few, and not in dispute.

By a contract made on August 25, 1892, the defendants agreed to sell the *Walter D. Wallet* to the plaintiffs on the following terms, inter alia: (1.) 500*l.* was to be paid on signature of the contract; 1000*l.* further was to be paid, and acceptances of the purchasers for 1915*l.* 15*s.* were to be given, before the vessel sailed from Liverpool, where she then was, for Barry. (2.) Policies of insurance approved by, and indorsed over to, the sellers, covering the whole vessel to her full value, on her voyage from Liverpool to Barry, were to be given before the vessel sailed from Liverpool, and similar policies on the voyage outwards from Barry, and, so long as she should lie at Barry, were to be given before the vessel left Barry. (3.) On receipt of the acceptances, and the policies covering the voyage to Barry, the sellers were to transfer the vessel into the name of Alfred Henry Compton, a member of the plaintiffs' firm, and the purchasers were to give the sellers a mortgage covering the whole vessel for the unpaid balance of purchase-money to be registered with the bill of sale.

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(1) 11 P. D. 92.
(2) 2 C. B. (N.S.) 467.
(3) 1 T. R. 493, 544.
(4) 5 B. & Ad. 588.
(5) 11 Moore's P. C. 155, at p. 187.
(6) Swa. 105.
(7) Law Rep. 1 A. & E. 72.

The 500*l.* was duly paid, and the acceptances given. Thereupon a bill of sale was executed on August 25, and also a mortgage. On August 25, however, William Ross, by whom the bill of sale was executed, had only sixteen sixty-fourths of the vessel; by September 20 he acquired in all sixty-two sixty-fourths, it being impossible for him to obtain the remainder till a certain will was proved. No difficulty, however, material in this case arose on this score, and though the 1000*l.* was not in fact paid when the vessel was arrested, there was no immediate difficulty on that point. But difficulty had arisen with regard to the policies of insurance. It was by agreement surmounted as regards the voyage from Liverpool to Barry, and the vessel proceeded to the latter place; but while the vessel was at Barry the plaintiffs were unable to obtain policies to the satisfaction of the defendants. They made great afforts to obtain policies covering all risks on the basis of 3500*l.* value, which the sellers required; but they were unable to obtain such policies on such a value. Much correspondence took place between the parties, and it was contended before me that the purchasers did obtain and tender policies which, under the terms of the contract, the seller was bound to accept. I doubt if the policies tendered did satisfy the contract; but I do not think it necessary to decide this.

On September 28, while the controversy about the policies was going on, and while the vessel had been for some days in course of loading at Barry, the defendants telegraphed to their agent, Mr. Hamilton, at Cardiff, that he was not to interfere with the loading, but must arrange to stop the vessel sailing without their authority. Mr. Hamilton had been a part owner of the vessel, but had transferred his share to Mr. Ross. "Forgetting," as counsel for the defendants put it, "or forgetting the importance of this fact," he issued a writ in an action of restraint as a co-owner, and on October 3 arrested the ship in the usual way.

The loading of the vessel, which then, I think, required about three days more for its completion, was not interfered with, nor was it shewn that the vessel was detained by the arrest, or that any specific pecuniary loss was sustained by the plaintiffs.

Under these circumstances it is contended on behalf of the plaintiffs, first, that an action lies at common law for this arrest with exemplary, or at any rate nominal, damages in respect of the infringement of the plaintiffs' right of possession; secondly, that an application can be made on the same ground in an Admiralty proceeding for similar damages. It is contended on behalf of the defendants, first, that no action lies at common law for abuse of an Admiralty process of arrest; secondly, that no such action lies without proof of actual damage; thirdly, that in an Admiralty proceeding in such a case there can be no damage other than compensation to the plaintiffs for actual loss sustained.

No precedent, as far as I know, can be found in the books of an action at common law for the malicious arrest of a ship by means of Admiralty process. But it appears to me that the onus lies on those who dispute the right to bring such an action of producing authority against it. As Lord Campbell said in *Churchill* v. *Siggers* (1): "To put into force the process of law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." Why is the process of law in Admiralty proceedings to be excepted from this principle? It was long ago held that an action on the case would lie for malicious prosecution, ending in imprisonment under the writ de excommunicato capiendo in the spiritual court: *Hocking* v. *Matthews.* (1) It can, therefore, hardly be denied that it would have lain for malicious arrest of a person by Admiralty process in the days when Admiralty suits so commenced, just as for malicious arrest on mesne process at common law. But if for arrest of a person by Admiralty process, why not for arrest of a person's property? I can imagine no answer, and the language of the reasons of the Privy Council in the case of *The Evangelismos* (2), quoted with approval in the late case of *The Strathnaver* (3) appears to me to treat the existence of such an action at common law as indisputable. The words to which I refer were employed by their lordships in speaking of the arrest of a ship in a salvage suit. Their lordships say (4), "Undoubtedly there may be cases in which there is either mala fides, or that crassa negligentia which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law, damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because, in the action in which the main question is disposed of, damages may be awarded."

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(1) 3 E. & B. 929, at p. 937.

Probably the reason why no example of such an action at common law is to be found, is that superior convenience, though not exclusive jurisdiction, to which the above words refer. As the Court of Admiralty, when setting aside the arrest (which would be the preliminary to a common law action), could do full justice to the injured person, he would not, and probably could not, subsequently resort to a common law tribunal.

It was, indeed, contended by counsel for the defendants that the measure of damages for malicious arrest in the Court of Admiralty was not the same as in the Courts of Common Law, and excluded, as I understood him, a demand for anything but actual pecuniary damages, capable of being estimated in exact figures.

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(1) 1 Ventris, 86.

(2) Swa. 378.

(3) 1 App. Cas. 58.

(4) At p. 67.

It is not, perhaps, necessary to decide this point, though, if the measure be the same, this action might be treated as an application to the Admiralty Division, and, if it be not the same, the argument for a right of action at common law is strengthened; but I cannot think that the measure of damages in the Courts of Common Law and that of Admiralty is, in law, different, though possibly the different mode of determining the damages might lead in practice to different results. I know of no authority for any such proposition; in general the measure of damages for tort in the Admiralty and in the Common Law Courts is the same. *The Argentino* (1), and the words above quoted from *The Evangelismos* (2), appear to treat it as being so.

But it was further contended before me that, assuming the action at common law to lie, special or actual damage must be alleged and proved. No doubt in an action on the case for commencing or prosecuting an action, civil or criminal, maliciously and without reasonable or probable cause, damage must be shewn: *Cotterell* v. *Jones*. (3) But when a malicious action terminates in an arrest of a person, that wrongful detention must of necessity cause some damage to the person who loses for the time his complete liberty. There can hardly be a better example of this than is afforded by the case of *Whalley* v. *Pepper* (4), where the plaintiff, an attorney, was arrested for a few minutes, and the jury gave him one farthing damages. Yet the action lay, and Littledale, J., who tried the case, refused to certify to deprive the plaintiff of his costs. It appears to me that detention of a man's goods stands in this respect on the same footing as detention of his person. It cannot be supposed that no damage results to him from it. I think that the case of *Chandler* v. *Doulton* (5) is an authority for this view. That was an action for excessive distress, and though the plaintiff failed to prove any actual damage, he was held entitled to a verdict, with nominal damages, which were fixed at 1*l.*—a sum which, as Martin, B., before whom the case was tried, explained, was probably too much, but which was named by him, as he did not

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(1) 13 P. D. 191; 14 App. Cas. 519.
(2) Swa. 378.
(3) 21 L. J. (C.P.) (N.S.) 2.
(4) 7 C. & P. 506.
(5) 3 H. & C. 553.

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wish to throw discredit on the plaintiff's case. It would appear from that case that the proper direction in an action for an excessive distress is to tell the jury that they must find a verdict for the plaintiff with some damages.

In the present case, I think that actual damage there was none. I doubt if, as was urged before me, the ship could have been arrested, when she was, by any proper process, though perhaps an injunction to prevent leaving port until the stipulated policies were given, and the stipulated sums paid, could have been obtained. But she was not detained in port by the arrest, nor was her loading interfered with. Still, the action of the defendants was, I think, clearly, in common law phrase, without reasonable or probable cause; or, in equivalent Admiralty language, the result of crassa negligentia, and in a sufficient sense malà fides, and the plaintiffs' ship was in fact seized. Therefore, I think the plaintiffs must be supposed to have suffered some damage, and I fix that damage at 1*l.* They are not, I think, entitled to their full costs, because the alternative claims which were abandoned, and the unsuccessful attempt to prove substantial damage, considerably enhanced the expense of the proceedings; but I give them half their costs. (1)

Solicitor for plaintiffs: *Robert Greening.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

(1) The President, by his decree, reserved, for further consideration, the costs of and incidental to an interim injunction, obtained by the plaintiffs, restraining the defendants from dealing with the draft for 1915*l.* 15s., given in part payment for the vessel, and granted a stay of execution until the question as to these costs should be decided. On April 21 the President made an order, in chambers, giving leave to issue execution after three days for 1*l.* and half costs, but made no order as to the costs of the injunction.

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THE ALSACE LORRAINE.

1893
May 9, 31.

Admiralty — Marine Insurance — Policy on Cargo—" Warranted free from Particular Average unless the Ship be stranded "—Cargo not on board at time of stranding.

The plaintiffs effected, with the defendants, an insurance on a parcel of rice on a voyage from Calcutta to Demerara, or Barbadoes, in a named ship. The policy contained the common memorandum, by which rice is warranted free from average unless general or the ship be stranded, and a special memorandum by which the rice was "warranted free from particular average unless the ship be stranded . . . ."

The ship, which was chartered by the plaintiffs to carry a cargo of rice, including the parcel in question, was of French nationality. She encountered heavy weather, obliging her master to jettison some of the rice, and subsequently to put into the Mauritius for repairs. To effect these repairs the cargo was discharged, and part of it, including some of the rice in question, being damaged, was condemned as unfit to be forwarded and sold. Whilst the vessel was being repaired, and whilst the whole of the cargo was on shore, a cyclone burst over the island during which the vessel stranded, and was found to have sustained such damage that she was condemned and abandoned. The remainder of her cargo was subsequently shipped on board a British vessel, and after a portion of it, including some of the rice in question, had been, in the course of the voyage, damaged by sea perils, it was finally delivered at Barbadoes. Freight pro rata itineris was, according to French law, paid by the plaintiffs on all the rice discharged from the French vessel at Mauritius.

The defendants paid their proportion of general average and forwarding charges, but disputed the plaintiffs' claim for 153*l.* 13*s.* 3*d.* for a particular average loss on the rice sold at Mauritius, and on that subsequently damaged in the British vessel, including the pro rata freight charged against the rice :—

Held, that the defendants were not liable, as the stranding took place at a time when the insured goods were not on board the vessel, and, therefore, the warranty against particular average remained in force.

HEARING, on point of law, as to the construction of a memorandum in a policy of marine insurance, warranting the goods free from particular average unless the ship be stranded.

The plaintiffs were Blackwood, Bryson & Co.; the defendants were the British and Foreign Marine Insurance Co., Limited.

The facts (which were not in dispute) were shortly as follows :—

By a charterparty dated January 5, 1892, the plaintiffs, through their Calcutta firm, chartered, from the owner's agent, the French ship *Alsace Lorraine*, of 610 tons register, then at Calcutta, to load a cargo of rice $\frac{\text{and}}{\text{or}}$ grain (oats excepted) in bags, the charterers having the option of shipping 100 tons of coolie stores, and therewith proceed to Demerara lightship for orders, to discharge either in one or two of the following ports, Demerara, Trinadad, or Barbadoes, certain perils which included dangers and accidents of the seas, rivers, and navigation excepted. The charterparty further provided that freight should be at the rate of 37*s.* 6*d.*, if the cargo were discharged in two ports, and 36*s.* 3*d.*, if at one port only, per ton, and should be paid on right delivery of the cargo at the port or ports of discharge on the basis of 20 cwt. per ton net weight delivered for rice $\frac{\text{and}}{\text{or}}$ grain, and for coolie stores according to the Bengal Chamber of Commerce Schedule, and the freight was to be payable in cash for so much as might be required for ship's disbursements, and the balance in cash on delivery at the bank-buying rate of exchange for ninety days' bill on London current on the day the delivery of the cargo should be completed.

In pursuance of the charterparty, a cargo of rice was loaded. It included two parcels, consisting of 5575 bags and 5500 bags of rice respectively. By the bills of lading, the rice was to be delivered at the port or ports as ordered as per charterparty, certain perils, including the above-mentioned perils, being excepted, unto order. Freight to be paid on right delivery at the port or ports of discharge, as per charterparty.

The plaintiffs insured the rice in question with the defendants under two policies, one for 175*l.* on the 5575 bags valued at 3915*l.*, and the other for 325*l.* on the 5500 bags valued at 3450*l.* The policies were in the defendants' usual form, and contained the common memorandum, by which, amongst other goods, rice is warranted free from average unless general, or the ship be stranded, sunk, or burnt, and a special memorandum as follows:—

"Warranted free from particular average unless the ship be stranded, sunk, burnt, or in collision, the collision to be of such a nature as may reasonably be supposed to have caused or led to damage of the cargo."

On January 17, 1892, the vessel left Calcutta for Demerara with a cargo of 11,150 bags of rice, and on February 21 experienced a cyclone causing considerable damage, and obliging her master to jettison 256 bags, which included some of the rice in question. In breaking through the bulkheads to effect this jettison, a portion of the cargo was damaged by sea-water, which gained access to it, and on the 22nd a further portion of the cargo was damaged by sea-water. On the 23rd the crippled condition of the ship was such that the master resolved, in the interest, and for the safety of all concerned, to put into the nearest port for repairs, and he accordingly bore up for Port Louis, in the island of Mauritius, where the vessel arrived on March 5, and was safely moored in the inner harbour.

In order to stop further damage through fermentation and the leaky state of the ship, and also to enable the repairs to be effected, the cargo was discharged.

On April 29, whilst the vessel was being repaired, a cyclone burst over the island of Mauritius, driving the vessel on the coral rocks, where she stranded and remained hard and fast, sustaining such damage as to be hopelessly lost. She was condemned, and abandoned, on May 9, and, on May 30, was sold by public auction for 6714 rupees.

This accident occurred while the whole of the cargo was on shore, and after a portion of it, including a large number of the bags of rice in question, had been condemned as unfit to be forwarded, and sold, but while it was contemplated that as soon as the repairs were finished, the remainder of the cargo should be reloaded and forwarded in the vessel to its destination. After the disaster to the vessel, the remainder of the rice was shipped on the British barquentine *Brazil*, which sailed from the Mauritius on June 5, 1892, and delivered her cargo at Barbadoes on September 6; but in the course of the voyage, she met with bad weather, and the rice on board her was damaged by perils of the sea.

According to French law, freight pro rata itineris was payable in respect of the carriage of the cargo to Mauritius, and the plaintiffs were compelled to pay, and did pay, freight pro rata itineris on all their rice which was discharged from the *Alsace Lorraine*.

On January 14, 1893, the plaintiffs' claim upon the two policies was adjusted, and shewn to amount, on the first policy to 87*l.* 15*s.*, and on the second to 162*l.* 2*s.* 11*d.*, or, in all, 249*l.* 17*s.* 11*d.*; but, as the defendants admitted liability for the general average loss by jettison, and by damage during jettison, and for the general average contribution, as well as for forwarding charges by the *Brazil*, they paid of the above amount 96*l.* 4*s.* 8*d.*, leaving a balance of 153*l.* 13*s.* 3*d.*, the sum sued for by the plaintiffs in the action, and representing a claim for a particular average loss on the rice made up, on the quantity sold at Mauritius, by deducting the net proceeds from the insured value, and, on the quantity forwarded by the *Brazil*, by a comparison of the sound and damaged values at destination, with the pro rata freight added as a charge upon the rice.

The defendants admitted that the *Alsace Lorraine* was a vessel of French nationality, and that she had, in fact, "stranded," but, they contended that the ship and cargo had parted company, and, in fact, never came together again, and that, as the portion of the rice which was sold at Mauritius was, at the time of the discharge, unfit for re-shipment, the adventure between the parties to the contract of affreightment had terminated, in respect of that portion, before the stranding, or that, at all events, as none of the cargo was on board the vessel at the time of the stranding, or ever went on board again, the damage could not have been occasioned by the stranding, and, therefore, the warranty was not deleted.

The questions for the opinion of the Court were: First, whether the stranding had the effect of deleting the warranty against particular average so as to render the defendants liable for the damage to the rice.

Secondly, whether the defendants were liable, in any event, to indemnify the assured for a rateable proportion of the distance freight paid to the owners of the *Alsace Lorraine* at Mauritius.

May 9. The case was argued upon the agreed facts set out in a memorandum referring to the charterparty, bills of lading, policies, and average statement by—

R. T. Reid, Q.C., and *Hollams*, for the plaintiffs;

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Joseph Walton, Q.C., and *Carver*, for the defendants.

The arguments of counsel appear from the judgment. In addition to the cases there mentioned, the following were referred to:—

By counsel for the plaintiffs: as to French law applying to the question of payment of freight pro rata itineris in respect of the carriage of the cargo to Mauritius: *Dent* v. *Smith* (1); *The August* (2); *Lloyd* v. *Guibert* (3); *The Gaetano and Maria.* (4) By counsel for the defendants: as to reason for underwriters agreeing to ascribe damages to stranding: *Nesbitt* v. *Lushington* (5); Arnould on Marine Insurance, 6th ed. p. 821. As to the underwriter on goods not being responsible for freight: Arnould on Marine Insurance, 6th ed. p. 801; *Great Indian Peninsula Ry. Co.* v. *Saunders.* (6) As to the time for the application of the memorandum: *Rohl* v. *Parr* (7); Phillips on Insurance, s. 1774.

Cur. adv. vult.

May 31. GORELL BARNES, J. [After stating the nature of the case, and referring to the terms of the charterparty and the policies, the learned judge continued:—] The defendants contended, first, that the F.P.A. warranty in the policies was not deleted, and that they are consequently not liable for anything coming under the head of particular average; secondly, that they are not liable for the distance freight paid to the owners of the *Alsace Lorraine* at Mauritius.

The first point depends upon whether or not the ship was stranded within the meaning of the memorandum so as to delete the warranty, because if the ship was so stranded the defendants are liable for the particular average loss, but if the vessel was not so stranded they are not liable.

There is no dispute about the facts connected with the stranding, but those facts give rise to a new point in the construction of the memorandum. The plaintiffs maintained that the stranding

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(1) Law Rep. 4 Q. B. 414.
(2) [1891] P. 328.
(3) Law Rep. 1 Q. B. 115.
(4) 7 P. D. 137.
(5) 4 T. R. 783, at p. 787.
(6) 1 B. & S. 41; 2 B. & S. 266.
(7) 1 Esp. 444, at p. 446.

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took place in the course of the adventure, and that, therefore, the warranties against particular average are deleted. The defendants, on the other hand, maintained that as the stranding took place when no part of the rice was on board the vessel, the warranties remain in force. There is some lack of precision in the plaintiffs' proposition, but I understand it to mean that the warranties are deleted if the vessel be stranded after the shipment of the goods and while they are covered by the policies, and while the vessel is still engaged under the contract of carriage, even though at the time of the stranding the goods are not on board the vessel.

I do not think that the plaintiffs' counsel were able to cite any case or refer to any principle which would establish this proposition.

In my opinion the defendants' proposition is in accordance with principle and the authorities.

In the recent case of *The Glenlivet* (1) I have already dealt with the introduction of the memorandum and the construction of the words "unless the ship be stranded" as a condition; but I may add that the judgments in *Burnett* v. *Kensington* (2) seem partly based upon the consideration that where a vessel was stranded the underwriters, in order to avoid a difficult inquiry as to whether or not the damage arose from the stranding or how much was owing to that cause, agreed to consider the loss to have happened in consequence of the stranding.

The stranding in that case took place while the goods were on board the vessel, and all the observations of the judges are applicable to such a condition of things only, and I do not think they could possibly have imputed to the underwriters a consent to treat the damages on the voyage as due to a stranding if the stranding occurred when no goods were on board.

In all the cases I have been able to refer to, except two, the stranding occurred while the goods were on board the vessel. One exception is in the case of *Roux* v. *Salvador* (3), where goods had been insured free of particular average unless the ship were stranded and were necessarily sold at a port of refuge, and the vessel with the rest of her cargo proceeded on her voyage, and was afterwards stranded. The Court decided that there was under the circumstances a total loss, and the question of stranding therefore did not arise. But Lord Abinger said (1): "It has been contended that the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we take of this case renders it unnecessary to enter into any discussion of the argument or to pronounce any opinion upon it."

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(1) Ante, p. 164.

(2) 7 T. R. 210.

(3) 1 Bing. N. C. 526; 3 Bing. N. C. 266.

The other exception is the case of the *Thames and Mersey Marine Insurance Co., Limited* v. *Pitts, Son, & King* (2), in which a steamer coming down the river Plate stranded with one parcel of insured goods on board before reaching Buenos Ayres, where she shipped another parcel of insured goods, which were lying waiting for her in lighters at the time of the stranding. A large portion of the insured goods sustained damage on the voyage from Buenos Ayres to Europe, but it was held that the assured could not recover for the damage to the parcel shipped at Buenos Ayres because of the warranty against particular average unless the ship or craft should be stranded, as the stranding did not occur while those goods were on board the vessel, though they were at risk under the policy in the craft at the time of the stranding. It is from this case that the plaintiffs' counsel take the words "stranding in the course of the adventure"; but it seems to me from the whole tenor of the judgments the judges were dealing with the adventure while it lasted on board the vessel.

In Phillips on Insurance, s. 1761, the author says: "The doctrine adopted in England appears to be, that, after a stranding the construction of the policy is the same, in respect to all losses on goods on board at the time of stranding, whether happening before or after the stranding, as if it had not contained this exception."

Arnould (Marine Insurance, 6th ed. p. 823), says: "The meaning of the memorandum, therefore, is"—then the author gives one or two matters which are not material on this point—

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(1) 3 Bing. N. C. 266, at p. 276.

(2) [1893] 1 Q. B. 476.

"if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist."

In my opinion, it is obvious that the memorandum requires the implied insertion of some words qualifying the generality of the words "stranded, sunk, or burnt" as regards time, and that there should be some such implication as "while the goods are on board the vessel which is stranded, sunk, or burnt."

It was practically conceded in argument that as all connection between the goods sold at Port Louis and the *Alsace Lorraine* had been severed by the sale of those goods before the accident, no claim could, according to the case of *Roux* v. *Salvador* (1), be made for a particular average loss in respect thereof, but the claim for a particular average loss in respect of those forwarded by the *Brazil* was maintained, although they were not on board at the time of stranding, and although the damage to them happened while they were on board the *Brazil*. For the reasons I have given I think this claim is not maintainable, and in my opinion the fact that it was contemplated that they should be reloaded on the *Alsace Lorraine* up to the time of the stranding makes no difference. It never can have been contemplated, and would be unreasonable to hold, that a stranding at a time when the insured goods were not on board the vessel should delete the warranty against particular average.

I think, therefore, that the plaintiffs' claim for a particular average loss entirely fails, and it is unnecessary to express any opinion upon the second point which only affects the amount of the particular average loss if any had been recoverable. Nor is it necessary to say anything about the points which were touched upon in argument but do not arise in this case, namely, as to the effect on the warranty of the stranding of a substituted vessel, or of the stranding of the one vessel, when the damage occurs in the other.

The judgment will therefore be for the defendants with costs.

I ought to say that I have assumed in this judgment that the sale took place before the accident, but I do not think it really is material.

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(1) 1 Bing. N. C. 526; 3 Bing. N. C. 266.

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Solicitors for plaintiffs: *Hollams, Sons, Coward, & Hawksley.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

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THE MOLIÈRE.

1893

May 31; *June* 1.

Admiralty—Collision—Overtaking Ship—Regulations for Preventing Collisions at Sea, Arts. 16, 20.

By art. 16 of the Regulations for Preventing Collisions at Sea, " If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

By art. 20, " . . . every ship . . . overtaking any other, shall keep out of the way of the overtaken ship."

The steamship *M.*, proceeding, at night, down the Bristol Channel, at a speed of seven and a half knots an hour, on a W. course, gradually overhauled the steamship *B. H.*—proceeding at seven knots an hour, on a W. ½ N. course—until she had drawn up on the starboard beam of the *B. H.* when the *M.* altered her course to W.S.W., and a collision occurred.

The *M.* charged the *B. H.* with (inter alia) a breach of art. 16. The *B. H.* charged the *M.* with a breach of art. 20. The Court found the *M.* alone to blame and:—

Held, that the obligation upon the *M.*, under art. 20, as the "overtaking" ship, to keep out of the way, continued, although she had ceased to be within the area lighted by the sternlight, and had advanced into a position in which she could see the side light of the " overtaken " ship.

ACTION of damage by collision.

The plaintiffs were the owners of the *Baines Hawkins.* The defendants were the owners of the *Molière.*

The facts—so far as material on the question of how long a vessel continues to be " overtaking " another within the meaning of art. 20 (1) of the Regulations for Preventing Collisions at Sea —were shortly as follows:—

On March 9, 1893, about 3.45 A.M. the screw steamship *Baines Hawkins* of 464 tons net register, and a crew of fourteen hands, from Cardiff to Gibraltar with coals, was from seven to eight miles

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(1.) Regulations for Preventing Collisions at Sea, 1884, art. 20: "Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship."

westward of Bull Point in the Bristol Channel. The weather was fine and clear with a light N.W. breeze, the tide was ebb of the force of one to two knots, and the vessel, with her regulation masthead and side lights, and a white light at the stern, duly exhibited, was proceeding at the rate of seven knots an hour, steering W. ½ N. magnetic. Those on board of her had for some time previously observed the masthead, and red side light, of a steamer which proved to be the *Molière*—of 965 tons gross register and a crew of eighteen hands from Barry to Havre with coals—about one mile distant and bearing about three points abaft the starboard beam. The *Molière* gradually overhauled the *Baines Hawkins*, and, it was alleged that, after drawing up abeam, the former vessel suddenly came towards her, as if under a starboard helm, causing imminent danger of collision. The helm of the *Baines Hawkins* was put hard-a-starboard and the engines kept full speed ahead as the only chance of avoiding a collision, but the *Molière* came on at full speed, and with her port side struck the bluff of the starboard bow of the *Baines Hawkins*, both vessels sustaining considerable damage.

According to the evidence given on behalf of the *Molière* that vessel was at the material time steering W.S.W. magnetic, making about seven and a half knots through the water, when the *Baines Hawkins* overhauled her, and, getting before her port beam, ported into her, so that each vessel charged the other with throwing herself across the other's course, but the Court—after considering the nature of the damage, and the fact that the *Molière*, as the outside ship, had the longer distance to go—came to the conclusion that the *Molière* was the "overtaking" vessel and that her course had been W., and was only, at a very late period, prior to the collision, altered to W.S.W.

Aspinall, Q.C., and *W. Baden Powell*, for the plaintiffs, the owners of the *Baines Hawkins*. It is submitted that at all material times, the *Molière* was an "overtaking" vessel within the meaning of art. 20. Her course was, within half a point, the same as that of the *Baines Hawkins*, and the collision was caused by the *Molière* suddenly starboarding to W.S.W. in order to keep down the coast. It was the duty of the *Molière* to keep out of the way of the *Baines Hawkins*, for even assuming that at the same time that she was overtaking the *Baines Hawkins* she was also crossing the course of that vessel, the overtaking rule, that is art. 20, was binding upon her: *The Seaton.* (1)

[THE PRESIDENT. Did not Sir Charles Butt subsequently qualify his decision in that case?]

No; the observations in *The Imbro* (2) all have reference to art. 11 in which the word "overtaken" is used in a narrower sense, and applies only to a vessel which is in a position to see the stern light of the overtaken vessel and not her side light, that is within the dark area of space from two points abaft either beam, but under art. 20, a vessel may still be "overtaking" although she has run into the range of the side light of the overtaken vessel, for she remains under the liability attaching to art. 20 until she has passed clear, that is, so long as there is risk of collision, no matter how long this may be, otherwise each of the two vessels might be under a different obligation, and the test of her being an "overtaking" ship would be that if she were put back on her course the side light of the other vessel would disappear.

Joseph Walton, Q.C., and *F. Laing*, for the defendants, the owners of the *Molière.* The two vessels were on converging courses, and, at the material time, the side light of the *Baines Hawkins* was visible to the *Molière*; the latter was, therefore, a "crossing" and not an "overtaking" vessel. This brings both vessels under art. 16 (3), and the duty was then cast upon the *Baines Hawkins* to keep out of the way of the *Molière.* According to the decision in *The Main* (4), a vessel is not "being overtaken" unless the ship which is going faster, and following, is within the space not covered by the lights of the first ship, though possibly the obligation upon the "overtaking" vessel to keep out of the way does not cease because, for a moment before the collision, she comes within the range of a side light of the overtaken vessel; but, as soon as the following vessel has overtaken the other, art. 16 comes in, and governs the relative obligations of the two vessels. As the *Baines Hawkins* did nothing to keep out of the way until the collision was imminent, it is submitted that she is alone to blame, for those in charge assumed wrongly that the *Molière* was on a parallel instead of a crossing course.

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(1) 9 P. D. 1.

(2) 14 P. D. 73, at p. 77.

(3) Regulations for Preventing Collisions at Sea, 1884, art. 16: "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

(4) 11 P. D. 132.

THE PRESIDENT (SIR F. H. JEUNE). [After commenting on the contradictory evidence as to which was the "overtaking" vessel, and holding that the account given by the *Molière* could not be relied on, the learned Judge continued:—] I think, therefore, I must take the story of the *Baines Hawkins* as being substantially correct. I am not so sure as to that part of it which says the *Molière* at the last moment threw herself, by a sudden action of the helm, described as a sheer, across the path of the *Baines Hawkins*.

If that part of the story is true, then it appears to me there is no need to enter on a consideration of the construction of any of the rules or the law affecting the case; because, if it is the fact that the two vessels were about 100 yards from one another when the *Molière* took the extraordinary step of altering her course in a sudden manner, it would be difficult on any ground to justify such action. Even if she were a crossing ship at that time, so sudden a course was so improper in placing the *Baines Hawkins* in very great difficulty, that it would be impossible to justify the action of the *Molière*. But I feel some doubt in accepting that part of the story, because there is the difficulty, which the counsel for the defendants pointed out, of seeing how, on that hypothesis, the *Molière* reached the position in which, at the time of collision, she undoubtedly was. Though, therefore, I am inclined to think there was some starboarding at a time which might be sufficient to condemn the *Molière*, I do not desire to rest my judgment solely upon that.

But, looking at the matter on broader ground, the *Molière* must be found to blame.

It appears to me that the view taken by the counsel for the plaintiffs with regard to the obligation on an "overtaking"

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The President.

vessel, is, on the whole, a sound one; that is to say, that when a vessel is an "overtaking" vessel within the strict sense of the word—that is, a vessel which is within the area lighted by the stern light, and then comes, whilst she is still advancing, into a position in which she sees a side light, sometimes, if not always, her obligation as an "overtaking" vessel to keep out of the way of the other still continues. It is admitted by counsel for the defendants that that would be so if, at the time of her seeing a side light, there was risk of collision. I do not see how any other admission than that could be made, because it would be strange indeed if a vessel overtaking came in sight of one of the side lights, and then suddenly, when there was risk of a collision, threw on the other the obligation of keeping out of the way. It may, on the other hand, be that, where there is no risk of collision at the time, if, for example, the vessel comes within sight of a side light at a considerable distance, the "crossing" rule may come into force; but, in this case, I am satisfied that the facts are such that one cannot suppose that the obligation of the *Molière*, as an "overtaking" vessel, was over. I think, therefore, the obligation upon her to keep out of the way of the *Baines Hawkins* continued, and that she did not perform that duty. That view appears to me to be consistent altogether with the case of *The Seaton* (1), and consistent also with the two other cases cited: *The Main* (2) and *The Imbro*. (3) That disposes of the case of the *Molière*.

Then there is the question whether the *Baines Hawkins* is also to blame. Holding, as I do, that there was no obligation on her to get out of the way, I think there is nothing to shew that she was to blame. There was no obligation on her to do anything until a time very shortly before the collision.

If the *Molière* really starboarded at the last moment, as the *Baines Hawkins* says, clearly there was nothing which the *Baines Hawkins* could have done; and on the whole I am inclined to think that the *Baines Hawkins*, in putting her helm a-starboard when she saw the *Molière* coming rapidly towards her, did all that she could properly do. The Trinity Masters coincide in

(1) 9 P. D. 1.

(2) 11 P. D. 132.

(3) 14 P. D. 73.

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this view. The result, therefore, is that the *Molière* must be held alone to blame.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche, & Temperley, Newcastle-on-Tyne.*

Solicitors for defendants: *Ince, Colt, & Ince, for Vaughan & Hornby, Cardiff.*

T. L. M.

1893

March 20, 28.

ASH *v.* ASH.

Divorce—Dismissal of Wife's Petition—Unnecessary Charges of Cruelty—Costs—Rule 159.

In a petition by a wife for divorce on the ground of adultery and cruelty, the petitioner, in addition to charging the respondent with the communication of venereal disease to her, which was the only evidence of adultery, made general charges of cruelty, as to which the respondent pleaded condonation. At the trial the jury found all the issues in favour of the respondent, and the petition was dismissed:—

Held, on application to allow the petitioner the full costs of the suit, that she was entitled to the costs of the main charge of cruelty and of adultery contained in it; but that, inasmuch as the other acts of cruelty charged had been obviously condoned, the charges in respect of them were equally unnecessary, whether the main charge failed or succeeded, and she was not entitled to the costs in regard to such charges.

APPLICATION for an order that the wife, the petitioner in a suit for divorce, be allowed the full costs of the suit in which she had failed.

This was a petition by the wife for the dissolution of the marriage, on the ground of her husband's adultery coupled with cruelty. The main charge of cruelty was the communication of venereal disease—which was the evidence relied on to prove the adultery—and there were also various charges of general cruelty. The case was tried before Gorell Barnes, J., and a special jury. The jury found all the issues in favour of the respondent, and thereupon the learned judge dismissed the petition. The other facts will be found stated in the judgment.

Lockwood, Q.C. (*Bartley Dennis*, with him), for the petitioner. The Court will allow the wife her full costs of the suit unless there has been something in the conduct of the case to deprive her of her right to them. The rule has always been to allow the wife's costs as against the husband, subject to two exceptions, first, where the wife has been found guilty her costs are limited to the amount for which security has been given by the husband, and, second, where the solicitor to the wife has done something wrong, or instituted proceedings without reasonable ground, the costs may be disallowed. Rule 159 is only put in force in extreme cases.

[They cited *Robertson* v. *Robertson* (1); *Smith* v. *Smith* (2); *Hurley* v. *Hurley* (3); *Delaforce* v. *Delaforce* (4); *Otway* v. *Otway* (5); *Jones* v. *Jones* (6); *Flower* v. *Flower* (7); *Conradi* v. *Conradi* (8); *Somerville* v. *Somerville.* (9)]

Inderwick, Q.C. (*Deane*, with him), for the respondent. The practice is that where the result of the cause is against the wife she cannot recover the whole of her costs without an order of the judge at the trial. The foundation of such practice is that where a wife is accused of adultery her solicitor ought to be provided with the means of defending her, and some latitude is allowed in all these cases. But there is a distinction between the case of a wife who is put on her defence by her husband and a wife who brings charges against her husband, thereby subjecting him to heavy expenses, and then applies to the Court for an order to compel him to pay the costs which she has incurred by bringing groundless charges against him. In the present case it is the wife who commenced the proceedings, and the husband was put on his defence—and all the cases cited are cases in which the wife was put upon her defence. The position of the parties is also to be considered. The husband has already given security for the wife's costs to the amount of 231*l.* 15*s.*, and he has filed an affidavit in which he states that he has already sold out more than 1000*l.* worth of securities, that he cannot deal with his pension of 360*l.* a year, and that he has no means which can be applied to the payment of additional costs. It must be borne in mind with regard to the charge of actual cruelty that the respondent's solicitors were aware of the letters which the petitioner had written to her husband. A wife who has failed in her suit must under the rule shew special circumstances in order to obtain costs to a larger amount than that at which they have been estimated by the registrar: *Duncan* v. *Duncan* (1); *Smith* v. *Smith*. (2)

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(1) 6 P. D. 123.
(2) 7 P. D. 84.
(3) [1891] P. 367.
(4) W. N. (1892) 68.
(5) 13 P. D. 141.
(6) Law Rep. 2 P. & D. 333.
(7) Law Rep. 3 P. & D. 132.
(8) Law Rep. 1 P. & D. 163.
(9) 36 L. J. (P. & M.) 87.

Cur. adv. vult.

GORELL BARNES, J. This case was tried before me in December, 1892, and lasted about eight days. It was a petition by the wife for a dissolution of the marriage on the alleged ground of her husband's adultery and cruelty, and the jury, after hearing the evidence, found without hesitation that the husband had not committed adultery—that he had not communicated a venereal disease to his wife, and that he had not been guilty of cruelty of any other kind. Upon that verdict I dismissed the petition. An application was made to me after the verdict to allow the wife her costs beyond those already secured, which in this case was not a large amount—and if I recollect rightly, a summons had been taken out for this purpose returnable on the last day of the trial. The question is what costs, if any, the petitioner is entitled to have awarded to her as against her husband. The main charge in the petition was that in the year 1886 or 1887 the husband had committed adultery with some person or persons unknown to the petitioner, and that as a result he had contracted a venereal disease which he had it was alleged subsequently communicated to his wife in or about the month of March, 1887. There were also charges of what I may term general cruelty in the course of the married life of the parties. The case was an extremely peculiar one. The petitioner alleged that she had only discovered the facts which she put before the Court in relation to the alleged occurrences in the years 1886 and 1887, to which I have referred, from some conversation which she had with a doctor in the month of May, 1891, she having been attended in the interval by several skilled practitioners. There is no doubt that the case was one which required great circumspection on the part of the solicitors who acted for her in commencing and continuing the proceedings.

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(1) Unreported.

(2) 7 P. D. 84.

Rule 159 of the Divorce Rules and Regulations provides that "when on the trial of a cause the . . . . verdict of the jury is against the wife, no costs of the wife of and incidental to . . . . trial shall be allowed as against the husband, except such as shall be applied for and ordered to be allowed by the judge at the time of such . . . . trial." The application to me was made under that rule, and was recently fully argued in Court so far as the law was concerned, while several details dealt with in certain affidavits subsequently filed have since been discussed before me in chambers. For the respondent it has been urged that he ought not to be ordered to bear any costs beyond the sums already secured, inasmuch as the case against him has entirely failed, and he has been subjected to an attack which has turned out to be unjustifiable. His counsel pressed upon me with great force the hardship which would be inflicted on the respondent if he were compelled to bear the petitioner's costs of this expensive trial in addition to his own, seeing that he had been found to be entirely free from blame. I agree in thinking that such a result would be a great hardship upon the respondent, but the question of costs as between husband and wife in this Court stands upon a footing different from that on which the question of costs between other litigants is regulated, and I must decide this matter in accordance with previous decisions by which I am bound.

It is, however, very difficult to decide these questions of costs quite satisfactorily. As the law stands it must be difficult, perhaps in some cases impossible, for a wife without separate estate to obtain protection against her husband, either by defending herself in a suit instituted by him, or by prosecuting one commenced by herself, unless she can employ a solicitor who will have a reasonable certainty of obtaining the costs which he may incur on her behalf. It is held, therefore, that a solicitor, acting even for an unsuccessful wife, is entitled to have his costs secured by the husband, provided that those costs have been reasonably incurred by him. The principal case upon this matter is *Robertson* v. *Robertson* (1) decided by the late Master of the Rolls, the present Master of the Rolls, and Cotton, L.J., who in their judgments dealt very fully with the principle which should guide the Court in deciding the difficult questions of costs arising in the administration of Divorce Practice. Sir G. Jessel says this: "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that rule is founded on the old English law, which gave the whole personal property of the wife to the husband and gave him also the income of her real estate, so that in the absence of a settlement (which as we all know is a comparatively modern introduction) she was absolutely penniless, and therefore the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony pendente lite, so as to provide for her maintenance. Of course, the husband may say, 'It is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty.' No doubt it is a hardship; but what would the wife have to say in answer? Suppose the wife had brought him a sum of 10,000*l.*, or 20,000*l.*, or 50,000*l.*, would she not have a right to say, 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course, it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment not to the wife who has nothing, but to the husband, and therefore it was quite right to secure him that payment by getting money paid into Court, and finally by payment of the proper costs incurred when the suit was heard. Now, as was observed by the learned judge in the case of *Flower* v. *Flower* (2), it is not the solicitor's fault if the wife is wrong. If he himself conducts the litigation properly, if he fairly investigates the charges, and sees a reasonable foundation for a defence, he is not to lose his costs and fair remuneration for his labour because he is not successful. No solicitor would engage in the practice of his profession on

(1) 6 P. D. 119, at p. 122.

(2) Law Rep. 3 P. & D. 132.

the terms of not getting paid whenever he was unsuccessful, and therefore, unless he himself has been guilty of misconduct, there is no reason for depriving him of his costs. It appears to me, therefore, that where the defence is fairly and reasonably conducted, the solicitor ought to be paid in full his costs—that is, his costs properly incurred. When we come to consider what has been done in this case, I think there is no ground whatever for saying that we are not at liberty to rescind the decision of the learned judge. He did not exercise any discretion at all—he simply made the usual order as to costs—therefore, it is not a case where the appeal is as to exercise of discretion; but a case where the judge, conceiving himself bound by a rule of practice which we think erroneous, simply followed that rule. Rule 159 is plain. [The Master of the Rolls read the rule.] That, of course, means 'ordered to be allowed' in the exercise of a judicial discretion, and it appears to me that there not being a suggestion that the solicitor of the wife has conducted himself otherwise than properly, or that he had not fair ground for believing that the wife had a defence against the charge of adultery, he ought to be allowed the usual costs."

I notice that the term "misconduct" is used in the course of the judgment; but it seems to me to amount to this, that if the solicitor incurs unnecessary costs he cannot be said to incur these costs relying on the credit of the husband. In fact he must look either to himself or his own immediate client for these costs. Brett, L.J., as he was then, says this: "Now it has been argued that it is unjust as against the husband that where the wife entirely fails in her allegations against him he should be made to pay the costs. I will not repeat what my Lord has said, but to my mind the reasons which he has given are conclusive to shew that it is not unjust, but on the contrary it is a question of high policy and high propriety, and there is no foundation for saying that it is unjust as against the husband that he should pay the costs of his wife's defence. Whether that defence be finally made out or not, I entirely agree that no high-minded husband would grudge the expense of enabling the wife to defend herself against such a charge as this or in any such dispute which might unfortunately arise between them. The fact of his being her husband ought to make him liable, and there are other reasons which my Lord has given which seem to me to explain this rule; therefore there is no injustice." He then deals with how the matter was formerly treated, and proceeds: "If the old rule of the Ecclesiastical Court was followed all the right and justifiable expenses ought still to be paid by the husband, the only difference being that though the amount cannot be ascertained till after the hearing, it ought to be ascertained with equal disregard of the results of the litigation. I come to the conclusion that that is the right rule, and moreover the only rule consistent with the old rule of the Court, namely, that discretion should be exercised in each particular case. The mode of exercising that discretion seems to me to be the one which is glanced at in *Flower* v. *Flower*. (1) If the solicitor who appears for the wife either knowingly promotes a case which it must be clear to anybody has no foundation at all so that he is countenancing improper litigation, or if he takes steps which are merely oppressive or obviously unnecessary, or if he crowds a case with absurd evidence, all those are reasons why if he so misconducts himself the costs of the wife should be disallowed either in whole or in part. But to say that as a rigid rule of practice he is only to be allowed on behalf of the wife the costs estimated before the trial, which estimate is by admission an erroneous estimate, seems to me to be wrong, and I believe that no one would be more happy to hear that the practice which has hitherto prevailed in the Divorce Court on this subject is now overruled by us who have the power to overrule it, than the present President (Sir J. Hannen)." Cotton, L.J., in his judgment used these words: "It is unnecessary to go into the question whether it is just or not that the husband should provide for the costs of the wife. That was the old established rule in the Ecclesiastical Courts; it was the practice of the House of Lords when Bills were introduced for divorce, and it was founded on this. When the wife has to take proceedings against her husband or he against her—all her property being in him—she ought to be provided at his expense with the

(1) Law Rep. 3 P. & D. 132.

means of bringing her case before the Court or of properly defending the case brought against her; and whether she is successful or not, in my opinion the rule is to this effect, that the cost properly incurred in bringing her suit before the Court or in defending the attack made on her ought to be paid by her husband."

I have therefore to consider, first, whether the petitioner's solicitors acted unreasonably in instituting and continuing these proceedings. Counsel for the respondent argued that they had, principally because as was alleged they did not make sufficient inquiries before proceeding, and that they cannot have thought there was a good case from the fact that they received certain moneys from an independent source. The petitioner's solicitor has given full explanation of the circumstances under which he commenced and continued the proceedings, and has in substance stated the materials that he had for judging the case. He has stated that the instructions were supplemented by the opinion of two eminent practitioners obtained not very long after the institution of the suit, and also that the sums were advanced partly to meet the bill of costs, and he says in his affidavit would have to be returned.

Both sides have discussed the case at considerable length and in detail, no doubt, owing to the peculiar circumstances of the case, and the conclusion to which I have come in the main point is that the solicitors cannot be said to have acted improperly in taking proceedings and in continuing the suit. It does not seem to me that the fact that they obtained considerable sums from another source is sufficient to deprive them of an order for costs properly incurred. A subsidiary point was raised by the respondent as to the other charges of cruelty, for which it was said there was no foundation, and with which it was also said the suit was unreasonably and unnecessarily incumbered. No doubt, in considering this point I am looking back over the proceedings, whereas a solicitor has to look forward with the material which he has. I have therefore endeavoured as far as possible to consider the point as it must have been presented to the solicitor's mind when commencing the case. The other charges—charges of cruelty—were in respect of various acts in the course of the

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married life of the petitioner and respondent. The petitioner had continued to reside with her husband from 1885 to 1891, notwithstanding what she alleged against him. She left her home on or about April 10, 1891, to pay a visit to London, and afterwards to Malmesbury. She parted with her husband on affectionate terms, and had every intention of returning to him and to her home, and during the time she was away, and until she discovered what led her, as she says, to make the charge of adultery and cruelty. In 1887 she corresponded with her husband on affectionate terms. I think that but for the alleged discovery she would have returned to him, and no proceedings would have been commenced. The jury found in his favour; but even if there had been any acts of cruelty on his part other than the matter said to have been discovered in reference to the alleged disease, they have been obviously condoned by the petitioner. Therefore, if there had been no charge in respect of the matters alleged to have been discovered, no suit for a judicial separation could, in my opinion, have reasonably been brought, and the only substantial contest there could be was in respect of the alleged discovery. The proof of adultery lay in the proof of the communication of disease, and if the charges in these respects failed, I think it was obvious that the charges in respect of other allegations of cruelty would fail also. If the charges on the more important points succeeded, the suit for divorce would succeed and there was no necessity to introduce the other charges; so that in any view of the case it could not reasonably be supposed that any advantage could ultimately be gained by introducing these other charges. If the main charge had been contested alone, the case would more easily have been fought, and in my judgment it was obviously unnecessary to introduce these other charges, and unreasonable to suppose that the respondent ought to be compelled to pay the expenses of both sides in contesting them. The introduction of them has unnecessarily added to the evidence and correspondence in the case, and to the time taken in trying it. I shall therefore refer the bill of costs to the registrar with instructions to tax as if the suit had only been based on the main charge of adultery and cruelty by communicating disease. To the extent of the costs when taxed

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upon this principle, I must hold that the respondent is liable, according to the decisions to which I have referred, credit being, of course, given for the amount already paid into Court or secured. I should add that no argument has been addressed to me to the effect of the Married Women's Property Act. This point was referred to but not dealt with in *Otway* v. *Otway* (1); but, as I have already said, I believe the petitioner in this case had no property of her own. I merely refer to it, as I do not wish it to appear that the point had escaped my attention. The order for costs will include the costs for adjournments since the trial, and my view is that the registrar will tax the costs on the footing of allowing costs which ought properly to have been incurred on the main issue. The petition is dismissed.

Solicitors for petitioner: *Warburton & De Paula.*
Solicitors for respondent: *Lattey & Hart.*

W. L.

IN THE GOODS OF DE BEAUFORT.

1893
May 9.

Probate—Administration—Will of Foreign Subject resident Abroad—Foreign Sureties to the Administration Bond—Practice.

The testator, a French subject resident in France, made a will there by which he constituted a domiciled French subject his universal and residuary legatee. Part of the estate was in the English Funds, and there were no debts in this country:—

Held, on application for administration with will annexed, that the administratrix might give an administration bond with two foreign sureties.

HENRY MICHEL DE GUY DE BEAUFORT, late of 43 Rue de Verneuil, Paris, died on November 22, 1892, leaving a will and codicil, by which he made various specific bequests, and constituted Madame Chalup, of the Place de la Cité Périgueux, La Dordogne, his universal and residuary legatee, but he did not appoint any executor. The deceased was a French subject domiciled in France at the time of his death, and the whole of his estate was situated in France with the exception of the sum of 1224*l.* 2*s.* 5*d.* in Consols. The deceased had no debts in this country. Madame de Chalup was desirous of taking out administration with the will annexed; but a difficulty had arisen in consequence of the presumed operation of a rule of November, 1892, precluding the acceptance of foreign sureties to an administration bond without the leave of the Court. She had no friends in this country willing to become sureties, and the guarantee societies required a very large premium for incurring the risk.

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(1) 13 P. D. 141.

R. H. Pritchard, moved that M. Champeny, notary of Paris, and M. Louvet, notary's clerk, be accepted as securities to the administration bond, and read an affidavit from M. Paul Lax, an advocate practising at the French bar, that these securities could be successfully sued upon their bond in the French courts if certain formalities were observed in its execution.

Gorell Barnes, J. A new rule has been made to meet such cases as this, and under that rule I make the grant.

Solicitors: *Peters & Bolton.*

W. L.

[IN THE CONSISTORY COURT OF LONDON.]

1893
March 24.

THE RECTOR AND CHURCHWARDENS OF ST. MICHAEL BASSISHAW *v.* THE PARISHIONERS OF THE SAME, BRAIKENRIDGE INTERVENING.

Ecclesiastical Law—Faculty—The Burial Act, 1857 (20 *&* 21 *Vict. c.* 81), *s.* 23 *—Order in Council ordering that all Human Remains under a Parish Church be removed—Duty of Persons interested to apply to Ordinary for Faculty to carry out Order in Council—Special Provisions in Faculty in the Interest of Relatives of Persons whose Remains are to be Removed—Costs.*

The powers for preventing vaults or burial-places becoming or continuing dangerous or injurious to public health which Her Majesty is empowered to exercise by Order in Council under the 23rd section of the Burial Act, 1857, are not inconsistent with the Court of the Ordinary possessing exclusive jurisdiction to authorize the removal and reinterment of remains buried in consecrated burial-places or vaults in consecrated ground.

Where therefore an Order in Council made under the above Act directed the churchwardens of a parish church to remove remains buried beneath the church to some other consecrated burial-ground and there to rebury them, and it appeared that such removal was advisable on sanitary grounds, the Court, on the application of the rector and churchwardens of the parish church, decreed a faculty to issue giving authority for the removal and reinterment of the remains, but confining the reinterment to a place of burial to be specified in such faculty, and containing provisoes as to the mode and manner in which the removal and reinterment should be carried out, and for safeguarding the interests of the relatives of persons whose remains were proved to have been buried beneath the church.

The Rector and Churchwardens of St. Mary-at-Hill v. *The Parishioners of the Same* ([1892] P. 394) followed.

THIS was a cause of faculty instituted on behalf of the rector and churchwardens of the parish church of St. Michael Bassishaw, in the City of London, for the purpose of authorizing the removal of human remains from beneath the said church under the circumstances stated in the judgment. (1)

An appearance as intervener was entered in the suit for Mr. John Braikenridge, a relative of persons whose remains were buried in the church, and a petition was subsequently filed by him praying that the remains of such persons might be removed

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(1) Burials in the Church of St. Michael Bassishaw, and the vaults connected therewith, were wholly discontinued in 1854 under an Order in Council of March 9, 1854, and gazetted on March 10 of that year.

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RECTOR, &c., OF ST. MICHAEL BASSISHAW v. PARISHIONERS OF SAME.

to the Great Northern Cemetery, and there at his expense reinterred in a separate grave to be selected by him.

March 17. The suit was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

H. C. Richards, and *Herdman,* appeared for the petitioners. An Order in Council (1) has been passed under s. 23 of the 20 & 21 Vict. c. 81, requiring the removal and reinterment in consecrated ground of all such remains as may be found beneath the parish church of St. Michael Bassishaw, and the present application is for a faculty to enable the petitioners to do what is necessary to carry out the terms of such Order. Such a faculty was recently granted by the Court in *The Rector and Churchwardens of St. Mary-at-Hill* v. *The Parishioners of the Same* (2), where the material circumstances were precisely similar to those in the present case.

The intervener appeared in person. He did not deny the jurisdiction of the Court to issue the faculty, but asked that it should contain provisions authorizing the reinterment of the remains of the persons referred to in his petition in a separate grave.

[The Chancellor intimated that in his opinion the faculty prayed for ought to issue, and that a proviso should be inserted therein to secure what was asked for by Mr. Braikenridge; but that as some misconception appeared to exist as to the correctness of the decision of the Court in the recent case of *The Rector and Churchwardens of St. Mary-at-Hill* v. *The Parishioners of the Same* (2), the judgment in the present case would be reserved until the next court day.]

Cur. adv. vult.

March 24. DR. TRISTRAM. The rector and churchwardens state in their petition filed in this case, that by an Order in Council, dated January 30, 1893, issued at the instance of the Home Secretary under s. 23 of 20 & 21 Vict. c. 81 (The Burial Act, 1857), the churchwardens have been directed to remove the whole of the human remains now lying under the parish church of St. Michael Bassishaw to some consecrated burial-ground, and there to rebury them; to fill up the vaults with clean, dry earth and relay the floor with a layer of concrete; the works to be done under the supervision and to the satisfaction of the medical officer of health of the City of London, and at the expense of the poor-rates of the parish. They further state, that they are advised that the order can only be properly and effectually carried out under the authority and direction of this Court under a faculty to be issued for the purpose; that they have given notice by advertisements in *The Times* and *City Press* newspapers of their application for this faculty, informing persons interested that they may apply to the Court to give special directions as to the reinterment of any remains that can be identified; that subject to such directions, any additional expense of executing which they desire to be cast upon the applicants requiring the same, they ask that the faculty should give them authority to reinter the remains to be removed in any public cemetery, in which the same may be the most advantageously deposited, with due regard to the proper and decent burial thereof, and the saving of expense to the parish.

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(1) Dated January 30, 1893, and published in the *London Gazette* of February 3, 1893.

(2) [1892] P. 394.

At the hearing, the report of Dr. Sedgwick Saunders, the medical officer of the City of London, was put in evidence, verified by his affidavit, and the following witnesses were examined, namely, the rector, one of the churchwardens, the architect of the church, the vestry clerk, and the beadle, who had held office in the church for forty-nine years.

It appeared by their evidence that the remains of about three hundred persons had been buried underneath the church since its re-erection after the great fire under Sir Christopher Wren; that some of them were buried in three vaults, one of which is under the vestry, but that many of them had been deposited in the soil immediately under the flooring of the church encased in coffins of wood, and some apparently only wrapped in woollen shrouds; that it had been arranged to refloor the church out of funds appropriated for the purpose under an order of the Charity Commissioners upon a plan prepared by Mr. Christian; that upon taking up the floor it was found that the execution

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of the plan would necessitate the removal from under the church of a large number of remains, which could be done without endangering its pillars or foundations; that previously to the taking up of the floor no unpleasant odour had emanated from the remains, and that the probable cost of their removal would be at least 1000*l.*, equal to a rate of 8*d.* in the pound, but that it might run up to 1500*l.*; that Dr. Sedgwick Saunders and Mr. Hoffmann, the medical officer of health to the Home Office, had personally inspected the church and had reported that for sanitary reasons it was essential that the remains should be removed from under the church; that the last burial in the church took place between 1840 and 1850, and that it was closed for all burials by an Order in Council, dated the 9th day of March, 1854. Had the sanitary condition of the church been brought to the notice of the Court in proper form, prior to the issuing of the Order in Council, it would have been its duty to decree a faculty for the removal of the remains, so soon as the churchwardens should have funds at their disposal for the expenses incident thereto: see the case of *The Rector and Churchwardens of St. Mary-at-Hill* v. *The Parishioners of the Same.* (1) But according to the evidence the churchwardens have now no funds in hand for such a purpose. The expenses might have been met, before the Act for abolishing the compulsory payment of church rates passed, by a vote of the vestry by a church rate, and before the City of London Parochial Charities Act, 1881, came into operation, in whole or in part out of the parochial funds formerly under the control of the churchwardens. The churchwardens, having been deprived by legislation of the only sources of income applicable to this unforeseen expenditure, have obtained an Order in Council under the 23rd section of the Burial Act of 1857, with the sole object of thereby making the expenses incident to the removal chargeable on the poor-rates of the parish.

The petitioners state in their petition, that they are advised, that this Order in Council cannot properly and effectually be carried out except under the authority of a faculty issued from this Court, and they also ask the Court to certify that the costs of obtaining the faculty are properly chargeable upon the rates.

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(1) [1892] P. 394.

The Court is of opinion that the Order in Council cannot lawfully be carried out without the authority of a faculty, inasmuch as it involves interference with the fabric and fittings of the church, interference with faculty vaults secured to families by decrees of the Court, and the disturbance and removal of remains deposited in consecrated ground.

It has been asserted by annotators on the Burial Acts, that there is no legal necessity in such a case for a faculty. This assertion would appear to be based on an opinion reported by them to have been given many years ago in a Cheltenham case by former law officers of the Crown, who are said to have so advised, and to have advised further, that if to carry out the works ordered it was necessary to pull down the pulpit, the reading-desk, pews, &c., of the church, such works would by necessary implication be justified by the Order in Council, and that the expense of pulling them down and restoring them in their former condition, upon the churchwardens proving that these acts were necessary to the carrying out of the order, would be chargeable upon the rates.

The Court is forced to the conclusion that this opinion must have been given by the then law officers of the Crown without their having given to the principles and rules of ecclesiastical law due consideration, as well as without forecasting the far-reaching consequences involved in the acceptance of their opinion as a correct statement of the law.

The churchwardens of St. Botolph, Aldersgate, having been served with an Order in Council directing them to remove the remains buried under their parish church to some consecrated burial-ground, coupled with a licence from the Home Secretary to remove such remains to some consecrated burial-ground, and having been advised by counsel in conformity with the above opinion that they would be warranted in carrying out this Order in Council without a faculty, through their vestry clerk have informed the registrar that they propose to do so (1).

The question whether a faculty or not is required depends upon considerations of ecclesiastical law, and the interpretation to be put upon certain expressions used in two of the sections of the Burial Act, 1857. These sections must be read in connection with the known principles and rules of ecclesiastical law in force at the time when that statute passed. And the sole question at issue is, whether the legislature intended by the expressions used in these sections to authorize the Home Secretary whenever he considered, from information received, the vaults in a church to be in an unsanitary condition, without notice to the bishop or his court, or to the incumbent of the parish or the parishioners, through the instrumentality of an Order in Council obtained on his representation or by his licence, to oust the Bishop's Court of its exclusive jurisdiction over the fabric of the church and over the vaults in the church, and to substitute the churchwardens as the sole Ordinaries of the church until the works directed by the Home Secretary should have been completed.

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(1) A similar faculty to that applied for in the present case was subsequently, on June 5, 1893, obtained from this Court on the petition of the rector and churchwardens of St. Botolph Aldersgate.

It will be convenient before the Court proceeds to consider the effect of these sections, that it should direct attention to the origin, foundation, and nature of the jurisdiction of the Bishop's Court in this matter.

Sir Matthew Hale, in his great work on the common law of England, gives the following account of the origin of the jurisdiction of the Ecclesiastical Courts in this country: "But the laws of England," he says, "have annexed, to certain offices, ecclesiastical jurisdiction, as incident to such offices. Thus every bishop by his election and confirmation, even before consecration, had ecclesiastical jurisdiction annexed to his office, as judex ordinarius, within his diocese. And divers abbots anciently, and most archdeacons at this day, by usage, have had the like jurisdiction within certain limits and precincts."

"But although these are judices ordinarii, and have ecclesiastical jurisdiction annexed to their ecclesiastical offices, yet this jurisdiction ecclesiastical in foro exteriori is derived from the Crown of England. For there is no external jurisdiction, whether ecclesiastical or civil, within this realm, but what is derived from the Crown. It is true, both anciently and at this day, the process of Ecclesiastical Courts runs in the name, and issues under the seal, of the bishop; and that practice stands so at this day by virtue of several Acts of Parliament, too long here to recount. But that is no impediment of their deriving their jurisdictions from the Crown" (Hale's History of the Common Law of England, p. 27). And my Lord Coke in his Institutes says: "The Consistory Court of every archbishop and bishop of every diocese in ecclesiastical causes is holden before his chancellor in his cathedral church, or before his commissary in places of the diocese far remote and distant from the bishop's consistory, so as the chancellor cannot call them to the consistory without great travel and vexation": Coke Fourth Institute, c. 74. Of Ecclesiastical Courts, p. 337.

As to the jurisdiction of the Bishop's Court over the fabric of the church, in *Maidman* v. *Malpas*, in which the defendant was articled for erecting a monument in a church without a faculty, Lord Stowell, presiding in this court, said: "There can be no question as to the jurisdiction of the Court, which is established by its own decisions, and those of the Temporal Courts, that no monument can be erected without leave of the Ordinary. . . . . It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals." (1) In *Jarratt* v. *Steele*, Sir John Nicholl in the Arches said: "All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these courts." (2) As to its jurisdiction over monuments and bodies buried in churches and churchyards, Lord Stowell, in *Hutchins* v. *Denziloe*, said: "If a churchwarden should give orders to remove a monument or a body without a faculty, he may be sued in the Ecclesiastical Courts." (3) In *Foster* v. *Dodd*, Byles, J., in delivering his opinion in the Court of Exchequer Chamber on the 23rd section of this Act, said: "A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground the ecclesiastical law will interpose for its protection." (4) As to the immediate custody of the church including that of the vaults in it, it is in the incumbent, be he rector, vicar, or perpetual

(1) 1 Hagg. Con. 205, 208.

(2) 3 Phillim. 167, 169.

(3) 1 Hagg. Con. 170, 172.

(4) Law Rep. 3 Q. B. 67, 77.

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curate, subject to the control of the Bishop's Court: *Griffin* v. *Dighton*. (1) The incumbent has the sole right to the keys of the church, the churchwardens being only entitled to access to it at due times in order to perform the duties of their office: *Ritchings* v. *Cordingley*. (2) As to the rights annexed to faculty vaults, they are secured to families by the decrees of the Court in consideration of considerable payments of money, and cannot be interfered with except in cases of necessity, and then only by an order of the Court after citing all persons interested in the vaults. As to the rights of the parishioners in respect of the fabric and fittings of the church, they cannot be intermeddled with except by a faculty, and after citing the parishioners and all parties interested, to shew cause why a faculty for that purpose should not issue. Generally, the church and churchyard are by law placed under the custody of the Court: *Adlam* v. *Coulthurst*. (3)

The above authorities and cases establish that from shortly after the Conquest up to the present time, the Ecclesiastical Courts have exercised, and have been held to be entitled to exercise, exclusive jurisdiction over all churches, churchyards, and consecrated burial-grounds, and that according to law there can be no substantial interference with the fabric or fittings of the church, and no body can be removed from the church or any consecrated burial-ground without a faculty.

But it has been recently suggested that, in such a case as the present one, a transfer of this jurisdiction has been made by the 23rd and 25th sections of the Burial Act, 1857. It must be borne in mind that, if there has been such a transfer of jurisdiction, it is a transfer of the jurisdiction of a Court of Law to the uncontrolled discretion of private individuals nominated either in an Order in Council or a Home Secretary's licence. It is, of course, competent to the legislature to make such a transfer, but according to the cases this cannot be done without a clear and explicit expression by the legislature that such was its intention. Sir Benson Maxwell, in his work On the Interpretation of Statutes, 2nd ed. p. 158, following the language of the cases he cites,

(1) 5 B. & S. 93, 108.

(2) Law Rep. 3 A. & E. 113.

(3) Law Rep. 2 A. & E. 30, 38.

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says: "As it is presumed that the legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of the Superior Court, without an explicit expression of its intention, so it is equally improbable that it would create a new jurisdiction with less explicitness; and therefore a construction which would impliedly have this effect is to be avoided, especially when it would have the effect of depriving the subject of his freehold, or of any common law right, such as the right of trial by jury, or of creating an arbitrary procedure. It has been said that the words conferring such jurisdiction must be clear and unambiguous, and that an inferior Court is not to be construed into a jurisdiction. . . . However effect must of course be given to the intention where the Act, without conferring jurisdiction in express terms, does so by plain and necessary implication."

It is to be borne in mind also that such a transfer of jurisdiction, as is asserted to have taken place under the section I have referred to, would deprive the families of persons buried in churches or churchyards of rights secured to them by ecclesiastical law in respect of the vaults, and of the remains of members of their family buried in such vaults. It would also deprive parishioners of their right to have the fabric of the church protected from injury by process of the Court. According to another well-recognised rule on the construction of statutes, such an alteration must be made in plain and unambiguous language. This rule is thus stated by Bowen, L.J., in *Mansfield* v. *Mansfield* (1): "in the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature." In the opinion of the Court there are no expressions to be found in either of these sections containing an indication that it was the intention of the legislature to oust the Bishops' Courts of such jurisdiction, or to deprive the subject of rights secured to him by process of such Courts.

Sect. 23 of the Burial Act, 1857, is as follows:—

"It shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal Secretaries of State, by and with the advice of Her Privy Council, from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health; and every such Order in Council shall be published in the *London Gazette*, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish: Provided always, that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the churchwardens or other persons or one of the churchwardens or other persons having the care of the vaults or places of burial to which the representation relates."

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(1) 43 Ch. D. 12, 17.

Sect. 25 of the same Act is as follows:—

"Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding ten pounds."

Before proceeding to examine and comment on these sections, I must observe that the Act in question is styled, "An Act to Amend the Burial Acts," and that it is a slovenly and carelessly drafted Act. For, in the preamble, five Burial Acts are recited as intended to be amended by it, and one of them has nothing whatever to do with burials, namely, 18 & 19 Vict. c. 78, as it relates solely to duties on stage-coaches, and other stamp duties, and yet in the last section of the Act of 1857 this Stamp Act is directed to be construed with the four Burial Acts recited and

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the Act of 1857 as one Act. It is further to be observed, that the four actual Burial Acts recited in the preamble indicate no intention of interfering with the ancient jurisdiction of the Ecclesiastical Courts over churches, churchyards, and consecrated burial-grounds. On the contrary, the bishop's jurisdiction is carefully preserved in all matters with which it is concerned. Had such an important invasion of the bishop's rights and the rights of the subject been contemplated, some mention of it would have been expected to have been found in the preamble to the Act of 1857.

On examining the 23rd section it will be found, that it is in no sense framed to meet the requirements incident to interference with the fabric of the church, the vaults in a church, and the removal of bodies from a church or consecrated ground. The acts authorized to be done under an Order in Council to be issued on the representation of the Home Secretary are expressed in the section in the most general and cursory terms, namely: "Such acts for preventing the vaults or places of burial from becoming or continuing dangerous or injurious to public health," and the agents in the matter are to be "the churchwardens or such other persons as may have the care of the vaults or places of burial referred to." If this section had been intended to relate to vaults in churches and in cathedrals, it might reasonably have been expected that there would have been some reference in it to churches and cathedrals. As to churches, it is to be observed that churchwardens in no way have the care of the vaults therein. Such vaults are under the immediate care and protection of the spiritual rector or of the incumbent, as having the freehold, or at least the possession of the church, in him, subject to the control of the Bishop's Court, and yet in the present case the rights of the rector were ignored, the notice required by the 23rd section being given and the Order in Council being addressed to the churchwardens, and not to the rector. Again, it makes no provision for any notice being given to the owners of the vaults, which are all held under faculties on the implied condition that the owners shall keep them in repair or forfeit their right to them. The owners if served with a notice in such cases might, and probably would, be prepared, at their own cost, to repair

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them instead of allowing the expense of so doing to be charged on the poor-rates of the parish.

The position conferred upon the churchwardens, if this strange notion is to prevail, leaves them in sole and uncontrolled possession of the fabric of the church, with full power and opportunity of doing unintentionally or even recklessly needless damage to the fabric and fittings and ornaments of the church, leaving the rights of the parishioners wholly unprotected. Furthermore, the section in question makes no reference to the removal of bodies, which in the cases of the City churches is a necessary consequence of these recent Orders in Council.

By an established rule of ecclesiastical law, no body having been once placed in consecrated ground can be removed from the place where it has been laid without a faculty, and even with a faculty, to other than consecrated ground, and no faculty can issue until the judge of the Bishop's Court is satisfied that the applicant for the faculty has such an interest as entitles him to the grant of the faculty.

The first paragraph of s. 25 of the Act permits bodies to be removed by a Secretary of State's licence, excepting in the cases where a body is removed from a consecrated place of burial to another by a faculty granted by the Ordinary for that purpose. I am aware, that it has been suggested that this section is so worded as to allow of our churches and churchyards being invaded by the sole authority of a Home Secretary's licence. Had it been the intention of the legislature to make such an important alteration in the law of this country, surely it would have done so in plain language. For mark the consequences of such a construction. It entitles the Home Secretary, by his licence coupled with the Order in Council, without previous notice to families or others interested in remains, to order their removal from consecrated, even to unconsecrated ground, and without so much as imposing an obligation upon him or his nominee of giving information, when asked, to the families and others interested of the place of their reinterment.

It also deprives families and others interested, when removal is necessary, of the right secured to them by ecclesiastical law of selecting the place for reinterment, and of superintending or controlling the manner of the removal. It was solely in consequence of the intervention of this Court, brought about by the legitimate and proper action of the rector and churchwardens of this parish, that Mr. Braikenridge's rights have been secured to him of making arrangements for and controlling the manner of the reinterment of the nine members of his family that lie buried in this church, in accordance with his natural feelings and respect for the dead.

It is further to be remarked that, if these two sections have application in the manner suggested to bodies buried in churches, it would place all cathedrals—in short, every consecrated edifice in England, not excluding the chapels royal—under the uncontrolled authority of the Home Secretary, acting through an Order in Council, obtained upon his representation that any vaults in any such edifice are in a condition injurious to public health, coupled with his licence under s. 25. The 23rd section contains no words applicable to cathedrals any more than to churches. The persons who in cathedrals have the care of the vaults are the head vergers, and if the Act is to be put into operation with regard to them the Order in Council might properly be addressed to the head verger, and he would then become, for the time being, master of the situation, and not the dean and chapter. The constitutional objection to such a construction is that it may place cathedrals and chapels royal, and our churches, outside the pale of the law, and practically consign them to the arbitrary power of the Home Secretary until the directions contained in the Order in Council have been carried out. If such a transfer of jurisdiction, and such an invasion of the rights of the subject—nay, even of the Sovereign—had been contemplated by the legislature, surely it ought to have been done in language that can be understood by the people.

I have felt it to be my duty to state my view of the law on this question fully on the present occasion, for the information of churchwardens as well as for that of parishioners and families, whose legal rights would be adversely affected by the supposed transfer of jurisdiction.

Should any churchwardens or parishioners be dissatisfied with the law as I have laid it down, their remedy is by appeal to the Arches Court, and from thence to the Judicial Committee. As the question is one simply of law, it can be raised and argued at small expense on the pleadings, and I should be prepared to assist, as far as I can, in facilitating such an appeal whenever desired. But until my opinion is overruled by a higher Court, it will be my duty to enforce the law as I have laid it down, and should any churchwardens take action under one of these Orders in Council and the Home Secretary's licence without a faculty, they are liable at the instance of the bishop, or of any other person desirous of vindicating the law, to be articled in the Ecclesiastical Court, and to be monished, and condemned in costs.

Having been invited by the counsel for the petitioners to express an opinion as to whether a rate may be validly made under this order, I may say that I have considered this question, and that I have come to the conclusion that the 23rd section of the Burial Acts, 1857, may, under the exigencies of the circumstances, be fairly held to be applicable to such cases as the present one, provided it be read as implying that the details of the order are to be carried out under a faculty. No reference to a faculty is made in the section; but when a statute is passed for the purpose of enabling something to be done, and omits to mention details necessary by law to be observed in the doing of it, the Courts may infer, with a view to give effect to the statute, that by implication it intended the details to be carried out in the manner prescribed by law. (1)

The Court orders the faculty to issue as prayed; that the remains be removed from under the church to a site selected for the purpose by the petitioners in the consecrated portion of the Great Northern Cemetery; that Mr. Braikenridge be at liberty to superintend by himself or his agents the removal of the remains of the nine members of his family buried in the church to a separate site in the consecrated portion of the cemetery selected by himself; also to remove to the same site the memorial slab placed in the church over their remains by his father; the cost of their removal, but not of the site and reinterment, to be paid by the churchwardens; that a memorial stone be placed in

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(1) See *Cookson* v. *Lee*, 23 L. J. (Ch.) 473, on appeal, per Lord Cranworth, L.C.

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the centre of the ground allotted to the other remains, stating that in the surrounding space the remains removed from the church of St. Michael Bassishaw, under a faculty from this Court, are interred; and further, that a notice on parchment of the place of their reinterment be placed in the vestry of the church, so that families and other persons interested may be made aware of the removal and place of reinterment.

The Court further orders, that any persons interested on applying at the Registry for a faculty for the removal of the remains of any of their family to any other consecrated burial-ground, will be entitled to a faculty free of charge authorizing such removal, but such removal to be at the expense of the applicant.

With regard to the costs of and incident to this faculty, the Court will certify that in its opinion these costs are properly chargeable upon the rates of the parish, inasmuch as if the churchwardens had carried out the Order in Council without a faculty they would have been guilty of an offence against ecclesiastical law, and would have rendered themselves liable to be articled in the Ecclesiastical Court for having so offended, and to have been monished for so doing, and condemned in the costs of the suit.

Solicitor for petitioners: *Bolton.*

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Admiralty—Ship—Marine Insurance—Collision Clause—" Sunken Wreck."

By a policy of re-insurance effected by the plaintiffs with the defendant on the hull, machinery, &c., of a steamship, the risk covered was " loss or damage through collision with (inter alia) any . . . sunken . . . wreck . . ."

The steamship whilst entering Port Talbot ran aground, and, on the tide falling, she was found to be resting amidships on the wreck of a steamer sunk more than a year before, and the ribs of which projected about a foot above the sand. She subsequently shifted her position about her own length further forward off the wreck and on to a bank of iron ore, which, two or three years before, had formed part of the cargo of another vessel:—

Held, that both the damage sustained by contact with the wreck, and by that with the iron ore, was " loss or damage through collision with sunken wreck," within the meaning of the clause in the policy.

Hearing, on point of law, as to the construction of a collision clause in a policy of re-insurance.

The plaintiffs were the International Marine Insurance Company, Limited. The defendant was F. W. Marten, and, according to a joint memorandum agreed upon between the parties, the issue to be decided was whether the defendant was liable to the plaintiffs, under the circumstances appearing from the papers, viz., the policy of re-insurance, the protest, two survey reports of surveyors, a joint certificate of the opinion of the same surveyors, a certificate of another surveyor on behalf of cargo, and a memorandum by the master of the vessel. The Court was to have power to draw inferences of fact, and the parties agreed not to adduce any other evidence. In the event of the defendant being adjudged liable for a portion only of the claim, the amount was to be assessed, upon such principles as the Court might lay down, by an average adjuster agreed upon or named by the Court.

The facts were shortly that:—

The plaintiffs effected with the defendant and other underwriters, for a period of twelve months ending July 6, 1893, a time policy of re-insurance covering 176,790*l.* on hull, materials, machinery, and boilers of certain steamers, one of which was the iron screw steamship *Munroe* of 397 tons register; the amount re-insured on her being 2000*l*., and, by the present action, the plaintiffs sought to recover from the defendant his proportion of this latter sum.

The material portion of the policy ran as follows:—

"Being a re-insurance of the International Marine I. C. Ld. and/or on account of whom it may concern against the risk of loss or damage through collision with any other ship or vessels or ice sunken or floating wreck or other floating substance or harbours wharves piers stages and similar structures and including the R. D. C. (running down clause), as in original and all special clauses such as Allans Cunards &c. as far as regards collision."

From the protest it appeared that:—

On January 30, 1893, the *Munroe* left Huelva with a cargo of copper ore and precipitate for Port Talbot, and, on February 5, anchored off the breakwater of that port. On the following day the vessel steamed up to the bar, but, finding there was a heavy sea on, came to anchor again. On February 7 the vessel proceeded towards the bar, but on nearing the pier she took a sheer to port. The helm was put hard over to port and the engines full speed ahead; but the vessel would not answer her helm, and ran on to the beach on the port side of the entrance where the vessel remained fast. On the tide falling she was left dry, and was found to be lying on an old wreck, and, on the tide rising with a high sea on the beach, the ship bumped heavily on the ground, and did so again the next day, when cargo was discharged between the periods of high water. The following day the vessel was found to have shifted a little towards the pier and was bumping and grinding heavily on the old wreck aft and on boulders of iron ore forward. On the 11th she became embedded further in the sand forward. On the 12th an attempt was made to get the ship off at high tide, and she came astern about 20 feet, and on examination at low water it was found that she had cleared the wreck, but had sustained considerable damage.

On the 13th another attempt was made with three tugs to get the ship off, and at 3.30 she floated into the channel, and was placed on the hard at the mouth of the River Avon. The discharge of the cargo was then completed and, after temporary

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repairs, the vessel was taken in tow to Cardiff, where she was abandoned to the underwriters and sold for 910*l.*

According to the certificate given by two marine surveyors who examined the damage "sustained to the keel and bottom of the steamer *Munroe*, lately stranded at Port Talbot on the wreck of the steamer *Salado*, (the surveyors were) of opinion that the *Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over same until she rested amidships, and remained, and that the damages sustained . . . were caused through her striking and grounding on the said wreckage."

According to the certificate of another surveyor "instructed to protect the interests of the underwriters on cargo of the *Munroe* stranded at Port Talbot . . . on the morning of the 8th (February), I examined the position of the vessel, and found she was lying fore and aft on the wreck of a vessel, the frames of which were from a foot to 18 inches above the sand . . . this wreck was that of the *Salado*, stranded there some twelve or fifteen months previously and abandoned . . . During the next two or three tides the *Munroe* moved about her own length further forward off the *Salado* and on to a bank of iron ore, which was a cargo of another vessel which had been lying there some two or three years. It is my opinion that the damage to plates of bottom was caused by the frames of *Salado* holing and the iron ore indenting them . . . (after she was taken to Cardiff) we found that eighty-four plates were damaged, her keel set up amidships, and her stern frame broken, decks set up and strained and water-tight bulkheads buckled, which damage in my opinion was principally caused by the excessive strain the vessel sustained lying on the wreck of the *Salado* and the bank of iron ore."

The memorandum of the master of the vessel stated that: "with reference to the accident to my steamer the *Munroe*, in which she was ashore at the entrance to Port Talbot . . . I beg to confirm the statement that during the time she was lying there she was lying partly on the wreck of the *Salado*, and partly on the remnants of the wreckage of a cargo of iron ore; that whilst lying there the greater part, if not all, of the damage sustained by her was caused by the obstructions and abnormal state of the shore in consequence of the wreckage.

This is borne out by the state of the bottom of the ship, which clearly shews that she was subjected to a strain which could not have been put upon her had she lain on the strand in a way which might be expected on a sandy bottom. . . . ."

Pickford, and *A. D. Bateson*, for the plaintiffs. It is submitted that the present claim falls within the words of the clause of the contract of re-insurance by which the defendant and others undertook to indemnify the plaintiffs "against the risk of loss or damage through collision with any . . . . sunken . . . . wreck," for when the tide fell the vessel was found to be lying on a sunken wreck; and she subsequently shifted so as to be partly on the wreck and partly on iron ore which had formed a portion of the cargo of another vessel.

If the *Munroe* had simply stranded on a sandy bottom she would not have sustained material injury; but the vessel became a constructive total loss by reason of the damage resulting from striking against, that is, colliding with, and resting on, the wreck and iron ore. [They were stopped by the Court.]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendant. The certificates given by the surveyors, and by the master of the vessel, as to the damage having been caused by the vessel striking and grounding on the wreck, are mere expressions of opinion to suit a certain theory and make out that the vessel was a constructive total loss, through a risk insured against; but, according to the master's protest, the *Munroe* "ran on to the beach," and the report made by the surveyor appointed on behalf of the owner correctly describes what happened. It states that the vessel "stranded" at the entrance to Port Talbot, and, on the examination made on February 8, was found "bedded in the sand to a depth of about five feet." The report goes on to state that "a quantity of wreckage was visible sticking out of the sand," but adds that on February 10 "the position of the vessel was altered and the forefoot more deeply bedded in the sand."

It is clear from this that the vessel ran aground and was fast forward with her stem buried in the sand. She then worked further up the beach so that amidships she lay upon the old ribs of the *Salado* projecting about a foot out of the sand. She afterwards shifted her position so as to rest upon some iron ore.

It is submitted that, in the first place, there was no "collision," that is, no clashing together of two bodies. Secondly, the debris of a ship buried in the sand is not what is meant, in any reasonable construction of the clause, for it is intended to cover the case of the *Munroe* running into a vessel obstructing a channel; nor, in any event, can the damage resulting from resting on the iron ore be said to be due to "collision with sunken wreck," as the mere fact that iron boulders on the beach had years before formed a portion of the cargo of a vessel will not make them "wreck" any more than stones or slates forming a bank would be so called, though some of them might have belonged to a cargo. Thirdly, there is no evidence that the collision, if any, with the wreck caused damage, for the forward part of the ship was never on the wreck and there was no damage forward. The damage was amidships and abaft amidships, and was due to the vessel when aground, lying in a place where there happened to be the remnants of a ship and some iron ore.

If the Court should find that the damage done by resting on the *Salado* was due to collision with sunken wreck, there will still be the question whether the damage due to resting on the iron ore falls within the clause, and, if not, an apportionment of the damage will become necessary, but it is submitted that the case is one, not of "collision," but of "stranding," and that the whole of the resulting damage is sufficiently accounted for in that way.

GORELL BARNES, J. The question in this case is, whether or not, under the circumstances which have happened, there has been loss or damage through collision with the matters described in the clause in the policy, which would enable the plaintiffs to recover from the defendant.

The facts are stated in the protest, in a memorandum of the master, and in several surveys which have been placed before me, and it seems that on February 7 the *Munroe* was entering Port Talbot, and in coming in, as she neared the pier, she took a sheer which those on board her were unable to counteract, and she ran on what they thought was the beach; but when the water left her, they found she was in fact lying on the top of an old wreck of a vessel called the *Salado*. She struck there very nearly amidships, and after an interval came further forward until she struck on some wreckage described as iron ore from some other ship which was lying there, and by both those strikings she was damaged. To what extent the latter was of serious import I do not know. It seems to me that practically no distinction can be drawn in substance between the two cases; but the question is, whether this is loss or damage through collision with a sunken wreck or sunken wrecks. It is said on the defendant's side, that it is nothing more than a taking of the ground, and that the ground was unfortunately harder underneath than it ought to be, owing to some submerged wreckage. I do not so regard the facts. The *Munroe* seems to me to have run on to a sunken wreck, and there remained fast until the damage was done by the wreck, and afterwards by the iron ore. The surveyors are of opinion that the *Munroe* first struck the projecting wreck of the *Salado* with her starboard bow, passed over the same until she rested amidships, and remained, and that the damages sustained were caused through her striking and grounding on the wreckage. The other documents are very much to the same effect, and the conclusion to which I have come is that this was "loss or damage through collision with sunken wreck," or wrecks within the meaning of the clause which affects this insurance; and that the whole of the damage is covered thereby. Therefore my judgment will be for the plaintiffs for an amount to be ascertained in the way agreed upon, or in the event of any difficulty the matter can be referred to me. The plaintiffs will have a certificate for their costs.

Solicitors for plaintiffs: *Field, Roscoe & Co.*
Solicitors for defendant: *Waltons, Johnson, Bubb, & Whatton.*

T. L. M.

1893
March 28.

In the Goods of MARCHANT.

Probate—Two Testamentary Documents—One only Executed—Probate of the executed Document, with directions to Administer the Estate in conformity with the Trusts of the unexecuted Document.

A testatrix left two testamentary documents, of which only one was duly executed. The first or unexecuted document made various specific bequests, and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew, "for the purposes I require him to do absolutely":—

Held, that the two documents could not be admitted to probate as together constituting the will of the deceased, but that probate might be granted of the second or executed document, with directions to the executor to administer the estate in conformity with the trusts of the first document.

Application for probate.

Elizabeth Marchant, spinster, late of Peterborough, died June 16, 1891, leaving two testamentary documents, both bearing date June 13, 1891, only one of which was duly executed.

It appeared that on June 13, 1891, the deceased dictated a will to her niece, who wrote it out, by which she made various bequests to relatives and others, and of which she appointed John Threlfall the executor. She then sent for Mr. Threlfall and Mr. John Harrison to witness her signature; and Mr. Harrison having read the will, represented to her that to execute this document would lead to great expense, and recommended that the testatrix should execute a shorter paper, which he would draw up for her, and which would carry out all she wished. Accordingly he drew up for her a will in the following terms:—

"This is the last will and testament of me, Elizabeth Marchant, now resident at No. 108, New England, Peterborough, in the county of Nottingham. I direct that all I possess I bequeath to Walter Marchant, of No. 108, New England, Peterborough, for the purposes I require him to do absolutely."

Both documents were read over to her, and she duly executed the last. The first paper was not executed. Walter Marchant renounced his right to take probate as executor according to the tenor; and

1893

IN THE GOODS OF MARCHANT.

Deane, moved that probate of the two papers, as together constituting the will of deceased, be granted to Mr. Threlfall, the executor named in the first paper. [He cited *Allen* v. *Maddock* (1); *In the Goods of Greves*. (2)]

THE PRESIDENT. There is no difficulty as to which of these documents is entitled to probate. The terms of the will shew that the testatrix intended to give instructions that her property should be disposed in the manner set out in the previous paper; but there is nothing to justify me in incorporating it with the will. The safest course will be to grant probate of the second paper, and to order that the executor administer the estate according to the trusts of the first paper.

Solicitors: *May, Sykes, & Batten.*

W. L.

[IN THE COURT OF APPEAL.]

C. A.

1893

June 19, 22.

THE RECEPTA.

Admiralty—County Court—Prohibition—Jurisdiction—Judicature Act, 1873 (36 *&* 37 *Vict.* c. 66), *ss.* 16, 34—*County Courts Act*, 1888 (51 *&* 52 *Vict.* c. 43), *s.* 132—*Practice—Tender—Alteration of Judgment as to Costs.*

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16: ". . . there shall be transferred to and vested in the . . . High Court of Justice, the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by . . . (5.) The High Court of Admiralty;" and by s. 34, "There shall be assigned . . . to the Probate, Divorce, and Admiralty Division . . . all causes and matters which would have been within the exclusive cognizance of the . . . High Court of Admiralty. . ."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132: "When the High Court, or a judge thereof, shall have refused to grant a writ of . . . prohibition to a court . . . no other Court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself . . ."

The plaintiff issued a plaint, on the Admiralty side of a county court, for damage by collision. The defendants denied their liability; but at the trial judgment was given for the plaintiff with costs, subject to a reference to the registrar to assess the damages. The defendants then paid into court, by way of tender, a sum which was found by the registrar to be sufficient to cover the damage. The judge thereupon rescinded so much of his judgment as dealt with the costs, and made a decree condemning the plaintiff in the costs of the action and of the reference.

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(1) 11 Moo. P. C. 427.

(2) 1 S. & T. 250.

The plaintiff applied to a judge of the Admiralty Division, who was sitting in chambers, in vacation, exercising the jurisdiction of all the divisions of the High Court, for a writ of prohibition in respect of so much of the decree as dealt with the costs of the action. The application was refused, and the judge did not desire any further argument.

The plaintiff appealed, and on objection to the jurisdiction:—

Held, by the Court of Appeal (Lord Esher, M.R., Bowen and Kay, L.JJ.), first, that, by virtue of the Judicature Act, 1873, a judge of the Admiralty Division has all the powers, as to prohibition, of a judge of the High Court; secondly, that, as the judge did not require any further argument, the appeal, in an Admiralty cause, was direct to the Court of Appeal, notwithstanding s. 132 of the County Courts Act, 1888, which only applies to proceedings in the High Court, and prevents an application to another judge of the High Court or to another Divisional Court, when the first judge, or Divisional Court, has refused to grant the writ; thirdly, that tender, by way of defence to the action, could not properly be made after judgment determining the liability; and, fourthly, that the county court judge, having included an order as to costs in his judgment determining the liability, had no power to rescind that portion of it.

APPEAL by plaintiff from the refusal of Gorell Barnes, J., to grant a writ of prohibition to the judge of the City of London Court.

The plaintiff was Frederick Gordon, on behalf of himself and others the owners of the steamship *Recepta*. The defendants were J. R. Francis & Co., bailees of the barge *Radiant*.

The facts were shortly that:—

On March 12, 1892, the barge *Radiant* drifted down upon, and did damage to, the steamship *Recepta* in the River Thames. On May 8 the defendants wrote to the plaintiff enclosing, without prejudice, a cheque for fourteen guineas to cover the damage sustained by the plaintiff. This sum was refused and returned. On June 16 the solicitors of the defendants wrote denying their liability. On July 18 the plaintiff issued a plaint in the City of London Court for damage by collision, and, on November 2, amended it by adding a claim for salvage services rendered by the plaintiff's servants to the barge.

On February 22, 1893, the action was tried on the Admiralty side of the Court, and the learned commissioner by his decree, sealed and dated of the same day, gave judgment for the plaintiff for the damage sustained subject to a reference to the registrar to assess the amount. In respect of the salvage services, he awarded the sum of 2*l.*, and it was "ordered that the defendants do pay to the plaintiff his costs of the action," the damages, salvage, and costs to be paid within seven days after the amount had been certified by the Registrar.

On March 2, the defendants paid fourteen guineas into court by way of tender for the damage, and on the same day the defendants' solicitors served a notice upon the plaintiff "that we have paid the sum of fourteen guineas into court in this action, and hereby tender the same to the plaintiff in settlement of the claim herein."

The parties however proceeded to a reference, the plaintiff claiming 45*l.* 12*s.* 3*d.* by way of damage, and, on May 1, the Registrar certified "that the sum of 14*l.* 14*s.*, which was paid into court by defendants on March 2, is sufficient to satisfy the amount of damage sustained by the plaintiff in respect of which this action is brought. In my opinion the plaintiff should be ordered to pay the costs of the reference."

The defendants then gave notice that they should apply to the Court to confirm the report, and that they should ask that the plaintiff be condemned in the costs of the action, and of the reference.

The defendants paid the 2*l.* awarded as salvage, and on May 10 the judge of the City of London Court made the following order: "It is this day adjudged that the plaintiff Frederick Gordon of &c., suing &c., is not entitled to recover anything beyond the sum of 14*l.* 14*s.* which has been paid into court by the defendants J. R. Francis of &c., in respect of the plaintiff's claim in this action for damage caused to the plaintiff's steamship *Recepta* by the defendants' barge *Radiant*, and it is ordered that so much of the said decree or order of February 22, 1893, as directs that the defendants do pay to the plaintiff his costs of this action be rescinded, and it is ordered that the plaintiff do pay to the defendants their costs of this action, including the costs of the reference to the registrar."

On May 24, Gorell Barnes, J., sitting as vacation judge in chambers, dismissed with costs an application by the plaintiff for a writ of prohibition "directed to the judge of the City of

London Court and to the above-named defendants prohibiting them from proceeding on so much of an order dated the 10th instant as gives the defendants the costs of the action instituted by the said plaintiff on the ground that the said judge having on the hearing of the said action on &c. made an order giving the plaintiff the costs of the action was functus officio and had no power or jurisdiction to alter or vary his judgment or order."

The plaintiff appealed to the Court of Appeal.

June 19. *Cranstoun*, for the respondents (defendants), took the preliminary objections, first, that the Court of Appeal had no jurisdiction to entertain the appeal, as by s. 132 of the County Courts Act, 1888 (1), there is no appeal to the Court of Appeal from the refusal of a judge of the High Court to grant a writ of prohibition as the words "no other Court" must include the Court of Appeal, and, secondly, that the appeal from the decision of the judge must, by that section, be to the High Court, and therefore the appeal ought to have been brought to a Divisional Court of the Queen's Bench Division. The vacation judge who heard the application happened to be a judge of the Admiralty Division, but he must be taken to have been exercising, at the time, the jurisdiction of a judge of the Queen's Bench Division, as only the jurisdiction capable of being exercised by a judge of the Admiralty Court at the date of the commencement of the Judicature Act, 1873, was by s. 16 of that Act vested in the High Court, and by s. 34 of the same Act only causes and matters which would have been within the exclusive cognizance of the High Court of Admiralty were assigned to the Probate, Divorce, and Admiralty Division when sitting in Admiralty. A judge of the Admiralty Court had no power to deal with a writ of prohibition, the Court itself being liable to be prohibited, and was so prohibited even after it became a superior Court.

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(1) 51 & 52 Vict. c. 43, s. 132: "When the High Court or a judge thereof shall have refused to grant a writ of certiorari or prohibition to a Court, or any such order as in the last preceding section mentioned, no other Court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself, or prevent a second application being made for such writ or order to the High Court or a judge thereof on grounds different from those on which the first application was founded."

[LORD ESHER, M.R. The Admiralty Court prior to its merger in the High Court was not a superior Court.]

By 20 Vict. c. 65 (1), the Admiralty Court was put on the footing of the superior Courts.

[LORD ESHER, M.R. As the result of various statutes, the Admiralty Court possessed some of the powers of a superior Court.]

Admitting that to be so, still, as a judge of the Admiralty Division, Gorell Barnes, J., would have no jurisdiction to hear this application. The case, therefore, must be treated as a civil proceeding on the Crown side of the Queen's Bench Division, and in accordance with Order LXVIII. of the Rules of the Supreme Court, 1883, applications for prohibitions must be conducted under the Crown Office Rules, 1886: *Mulleneisen* v. *Coulson.* (2)

[LORD ESHER, M.R. The present application is not a Crown Office matter at all.]

Butler Aspinall, for the appellant (plaintiff). It is submitted that the plaintiff is in order in appealing to this Court. He applied in the first instance under s. 127 of the County Courts Act, 1888, by which any judge of the High Court, as well during the sittings as in vacation, may hear and determine applications for writs of prohibition to a county court.

On the refusal of Gorell Barnes, J., sitting as an Admiralty judge in the vacation, to grant the writ of prohibition, the plaintiffs followed the Admiralty practice, which is similar to that in the Chancery Division, viz., that the appeal is direct to the Court of Appeal, where a judge having given a decision in chambers does not desire to hear any further argument in court, and the learned judge must be taken now to have certified to that effect: *Rigg* v. *Hughes.* (1) The list of appeals from inferior courts to be made out, under Order LIX., r. 4, of the Rules of the Supreme Court, 1883, by the officers of the Crown Office Department, is for the purpose of such appeals being heard by Divisional Courts of the Queen's Bench Division, and does not affect the Admiralty procedure in Admiralty cases.

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(1) In *Mayor, &c., of London* v. *Cox* (Law Rep. 2 H. L. 239), Willes, J., at p. 258, is reported as saying, "Far different was the language used in the public Act of 20 Vict. c. 65, to put the Admiralty Court upon the footing of the superior Courts." This passage is quoted by Sir J. B. Karslake, Q.C., in argument, at p. 289 of *James* v. *South Western Ry. Co.* (Law Rep. 7 Ex. 287); but the statute referred to would appear to be the Act of 1840 to improve the practice and extend the jurisdiction of the High Court of Admiralty of England (3 & 4 Vict. c. 65), which was followed in 1861 by the 24 Vict. c. 10.—*Reporter's note.*

(2) 21 Q. B. D. 3.

As to s. 132 of the County Courts Act, 1888, the explanation is that that section is, in effect, only a repetition of s. 44 of the repealed County Courts Act, 1856, substituting the words "High Court" for "superior Court," the object of the repealed section having been to prevent parties running round from one superior Court, or a judge thereof, to another superior Court or a judge thereof, at a time when the refusal of one superior Court to grant the writ did not prevent an application to another superior Court. It is submitted that that section in no way affects the general right of appeal to this Court under s. 19 of the Judicature Act, 1873, and as ss. 3, 5, and 16 of this latter Act make the High Court of Admiralty part of the High Court of Justice, and give all the judges of the High Court equal power, authority, and jurisdiction, it follows that a judge of the Admiralty Division has power to deal with prohibition.

[The case of *Jones* v. *Slee* (2) was referred to.]

LORD ESHER, M.R. It seems to me that the decision on the preliminary objection depends upon the reading which we think it right to give to the 132nd section of the County Courts Act, 1888. When the practice with regard to moving for prohibition in the old courts is brought to mind—viz., that you might move for prohibition in one court, and, if it was refused, you might move for prohibition in another, and so on (and I believe you might go to the Chancery Courts also in the same way)—it is evident that the legislature wished to put an end in the new practice to such an unnecessary multiplication of applications for prohibition, particularly if there was an appeal from the first decision. Under the old system there was no appeal, and therefore the party asking for prohibition went about from one court to another until he got one who would grant a writ. But if you have the right of appealing from the first, there is no reason why you should go on multiplying applications to co-ordinate courts or judges.

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(1) 9 P. D. 68.

(2) 32 Ch. D. 585.

Now, this is what you have when you have got to the High Court under the Judicature Act of 1873. The first section with regard to appeals (s. 19) gives the right of appeal from every order or judgment of the High Court. That section, therefore, renders it unnecessary that the old practice should be allowed to continue of going from judge to judge and from court to court, all and each of co-ordinate jurisdiction, because there is a right of appeal from the first refusal to grant the writ. That being so, it seems to me the real object of the 132nd section of the County Courts Act, 1888, is to do away with those repeated applications to judges of co-ordinate jurisdiction; that is to say, to the divisions of the High Court, and that you are not now to be allowed to go from one division to another.

It might have been argued that you could, if you were to bring into the new practice the old system. I therefore read that section as meaning, if you have applied for prohibition to a judge of the High Court, you cannot go to another judge of the High Court. If you apply for prohibition to a Divisional Court of the High Court, you cannot go to another Divisional Court of the High Court. Taking it so, it does not refer to an appeal to this Court at all. This reading leaves both parts of the section applicable, and that view is strengthened by this: that if only the first part of the section with regard to the several applications to the High Court were left applicable, it would have been said the legislature had done away with the right of appeal from a judge of the High Court to a Divisional Court, and therefore the second part of the section was inserted with the result that the right of appeal to the Court of Appeal is unaffected.

The whole section applies to matters within the High Court, and does not apply to the case of an appeal from the High Court or a judge.

As to the point taken, that Barnes, J., when he refused this prohibition, was sitting as a judge of the Admiralty Court, it is clear that he was sitting as a judge of the High Court for all the divisions. It was vacation, and he was exercising all those jurisdictions. But when the case of prohibition in respect of Admiralty jurisdiction came before him, I have not the least doubt that the proper way of dealing with it is to say that he acted as a judge of the Admiralty Division, and so acting the Judicature Act has given him, as such judge, all the powers of any judge of the High Court, amongst others, the power in such a case to issue or refuse a writ of prohibition. As it must be assumed that he did not desire any further argument, the appeal is properly brought direct to this Court.

BOWEN, L.J. I am of the same opinion. I will deal first with the objection taken, that Barnes, J., when he refused to grant this prohibition, was sitting as a judge of the Queen's Bench Division only, and not as judge of the Admiralty Division; and that, therefore, the matter ought to have gone first to the Divisional Court of Queen's Bench and not have come direct here. That seems to me to be based upon a misconception of the effect of the Judicature Act and the practice of granting prohibition. The Judicature Act affects every branch of the High Court, and one of its objects was to prevent suitors being dragged from one court to another. Accordingly the Courts of Common Law and other branches of the High Court were clothed with complete power to do all that justice required with regard to the subject-matters submitted to them. It was held accordingly, by the late Master of the Rolls, Sir George Jessel, in *Hedley* v. *Bates* (1), that the Court of Chancery by the Judicature Act had power to grant injunctions, to issue writs of prohibition, and otherwise grant relief, as if the subject-matter were within the jurisdiction of the Court of Chancery.

Then it was asserted that prohibition was a matter which necessarily went into the Crown paper, and hence it followed that prohibition belonged to Crown practice and to the Queen's Bench Division. That was a mistake. Under the old system applications for prohibition might have been made to the Court of Common Pleas or to the Exchequer Court, or to the Queen's Bench separately; since the Judicature Act, by which all the Courts were merged together, writs for prohibition are usually

(1) 13 Ch. D. 498.

moved for from the Crown side of the Queen's Bench Division, but there is nothing necessarily confining prohibition to Crown practice, and it is incorrect to say that it essentially and virtually belongs to the Crown side of the Queen's Bench Division, and in *Jones* v. *Slee* (1) this Court dealt with the matter as being within the jurisdiction of the Chancery Division. Why should we deal differently with the Admiralty Division and drive a suitor to another Court less familiar with the particular matter in dispute than an Admiralty Court?

The second point is more difficult, viz., whether upon the refusal of the judge of the Admiralty Division to grant prohibition, and assuming that Mr. Justice Barnes did not desire to hear the matter re-argued in Court before him, the appellants could come to this Court. That depends on the 132nd section of the County Courts Act of 1888. The true way of dealing with the language of the section, which is exceedingly embarrassing, is to apply to it the broad line of reasoning expressed by the Master of the Rolls.

The Judicature Act, 1873, s. 19, gives a right of appeal from any judgment or order of the High Court, and therefore from an order of the Admiralty Division as from any other. The section which it is said has taken away that right of appeal must be looked at to see whether it has done so. If it has, it would be expressed in an effective and clear manner; but if the words are looked at it will be found that such a construction cannot be put upon them.

The words are, however, embarrassing for this reason: under the old system you could go to each division of the old courts and apply for prohibition, so that after it had been refused in the Queen's Bench, you could go to the Exchequer, and so on; but after the Judicature Act, by which a right of appeal was given, language applicable to the old state of things became inapt. It really looks as if s. 132 of the Act of 1888 was a carelessly drawn re-enactment of s. 44 of the County Courts Act of 1856. At that time there was more than one superior Court, and probably the inadequacy of the expression due to simply cutting out the words "superior Court" and substituting "High

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(1) 32 Ch. D. 585.

Court" did not occur to the draftsman. The legislature has enacted that after one refusal of the High Court no other Court of co-ordinate jurisdiction shall grant the writ; but that leaves untouched the right of appeal to this Court from a refusal to grant prohibition. Upon that ground I entirely agree with the Master of the Rolls.

KAY, L.J. I am clearly of opinion that the effect of the Judicature Act is to alter the position of the Court of Admiralty by making it a superior Court of equal jurisdiction with other branches of the High Court, and also to give to it, as to each of the other branches, the same jurisdiction which each, any, or all of them had before. Therefore it seems clear that the result of s. 16 of the Judicature Act, 1873, would be to give it, amongst other jurisdictions, the power to grant or refuse, if it shall be right and proper, writs of prohibition.

By various County Court Acts, Admiralty jurisdiction has been, to a limited extent, conferred upon county courts, and certainly the Court which should issue prohibition against a county court exceeding its jurisdiction in an Admiralty matter would most properly be, though I do not say exclusively, that division of the High Court to which Admiralty matters are assigned. I have no doubt that Mr. Justice Barnes when he entertained this application was sitting, and should be treated as sitting, as a judge of the Admiralty Division of the High Court, and had power to deal with the application.

As to the second point and the difficulty which arose from the use of the words "no other Court" in the 132nd section of the County Courts Act of 1888, I do not think the section was addressed to that point at all. Its meaning is that when an application has been refused by one judge or Divisional Court, the words of the section prevent an application being made to another judge or Divisional Court. I agree with the Master of the Rolls and Bowen, L.J., that the words of the section do not take away the right of appeal to this Court, for it has been laid down in the case of *Lister* v. *Wood* (1) that where the Divisional Court refuses to grant a writ of prohibition the Court of Appeal has jurisdiction. It follows from this that the section in question does not interfere with the right of appeal to this Court, and therefore the appeal lies.

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(1) 23 Q. B. D. 229.

Objection to jurisdiction overruled.

June 22. The appeal was heard on the merits.

Butler Aspinall, for the appellant (plaintiff). The learned judge of the City of London Court had no power to rescind that part of his order which dealt with the costs, as it was not only a judgment determining the liability, but also was a decision as to the costs of the action. The rescission was therefore without jurisdiction, and prohibition will lie. The plaintiff is, however, willing to admit that he cannot resist payment of the costs of the reference, because a reference is always treated as a separate litigation, and the plaintiff failed to prove any greater damage than the amount the defendants paid into court.

Cranstoun, for the respondents (defendants). The registrar of the City of London Court ultimately found that the 14*l.* 14*s.* which the defendants had offered to pay by way of damages before action brought, and which was paid into court before the reference was held, was sufficient, and therefore the learned commissioner was fully justified in ordering the plaintiff to pay the costs of an action which had been unnecessarily incurred. He therefore directed that so much of the order as gave the plaintiff his costs should be amended, and that the plaintiff should pay the defendants their costs. It is not usual to make any order as to costs until after the report of the registrar, and so much of the order of February 22 as relates to costs was rescinded because it was erroneous, and was incorrectly drawn up, having never in fact been made.

[LORD ESHER, M.R. How do you shew that?]

By the affidavit of the clerk of the solicitors of the defendants, who was present at the trial.

[LORD ESHER, M.R. Such an affidavit is inadmissible for that purpose. You cannot shew by such means that the sealed order of the Court is erroneous.]

It is submitted that the first order of February 22 was merely interlocutory, and the final judgment was that contained in the order of May 10, made after reading the report of the registrar. A decree in an Admiralty action fixing the liability, but leaving the damages to be assessed, is not final: *The Duke of Buccleuch.* (1)

[The following case was also referred to, on the question as to the power of the Court to alter its own order deciding questions which the Court had not intended to decide: *In re Swire, Mellor* v. *Swire.* (2)]

LORD ESHER, M.R. The plaintiff brought his action for damage and for salvage, and the defendants denied their liability. The defendants might have tendered and paid money into court with a denial of liability. It was said that they did make a tender in a letter; but that was a letter written without prejudice, which ought, therefore, never to have been produced. The case went to trial merely on the issue of liability, and judgment was given against the defendants, the terms being that they should pay 2*l.* on the salvage part of the claim; that they should also pay what damages in respect of the collision might be found due, together with the costs of the action. After that the defendants made what was called a tender, though they could not tender by way of defence to an action where the liability was already determined. They paid this money into Court, and then the case went to a reference.

All that was submitted to the registrar was what was the amount of the damage, and the Court had not to consider anything, but to enter the sum found due as damages. The judge could not alter the judgment he had given. The proper way of dealing with the matter, if the order had been drawn up contrary to the intention of the judge, would have been to have gone to him and said so, and then the second order would have been to amend the first.

Beyond all question the first judgment was given; it was drawn up under the seal of the Court exactly as it was then intended; but by some misfortune or other it has been altered, and altered unjustly. We must now by consent put the matter right.

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(1) [1892] P. 201.

(2) 30 Ch. D. 239.

Bowen, L.J. The learned judge decided the question of liability, and referred the damages for inquiry. At that time it was his duty to make up his mind about the costs incurred in deciding the question of liability, unless he wished to reserve that matter to a later stage, and thought that the amount of damages recovered might affect it. But he took the course of deciding the question as to the costs of the action, referring the damages for inquiry, and leaving over, by his silence, the question of the costs of the reference.

It was said that such was not the order he intended to make; but there was no evidence of that. It certainly was the proper order. I cannot accept the view of the solicitors' managing clerk, who was at the trial, that the judge did not intend to make it. If it was wrong, an application should have been made to the judge to put it right. Before going to reference, a step was taken which it was said amounted to a tender, but it was not a tender which affected the issue as to liability. The fact that such a course was taken might properly and reasonably affect the Court afterwards as to how the costs of the reference should be borne; but a course of that kind, taken after the liability had been decided, could not affect the costs of deciding that liability. The reference proceeded, and it was admitted that not enough was recovered by the plaintiff to make it just that the costs of the reference should be borne by anybody except the plaintiff himself.

The plaintiff now offers to pay the costs of the reference, but contends that this is all he ought to be called upon to pay. After the reference, the parties seem to have gone back to the learned judge, and instead of leaving him only to decide the question of the costs of the reference, the defendants persuaded him to rescind the order previously made as to the costs of the action, and to allow for this subsequent tender. Instead of simply dealing with the costs of the reference, he altered his previous view and express order as to the costs of the action. He, in fact, rescinded so much of his former order as dealt with the costs of the action. But his former decision was—as to this—a final judgment, and the judge could not go back upon it. He had no power to rescind the old order. Therefore the plaintiff was entitled, either by way of appeal or of prohibition, to have his first order put right. To that the parties have wisely consented.

KAY, L.J., concurred.

LORD ESHER, M.R. We are all of opinion that a tender could not properly be made, as a defence to the action, at the time it was made in this case.

By consent the following order was drawn up: "That plaintiff is entitled to recover the sum of 14*l.* 14*s.* paid into the City of London Court by the defendants as a tender in respect of plaintiff's claim for damage, and also to recover the sum of 2*l.* in respect of his claim for salvage; and further, that defendants do pay the costs of the action in the City of London Court, of the application on May 24, 1893, to the High Court of Justice, and also of this appeal; and further, that the plaintiff do pay the costs of the reference."

Solicitors for appellant (plaintiff): *Botterell & Roche.*
Solicitors for respondents (defendants): *Keene, Marsland, & Bryden.*

T. L. M.

[DIVISIONAL COURT.]

1893
Aug. 1.

THE GLENDEVON.

Admiralty—Charterparty—Time for Discharge of Cargo—Despatch Money—Sundays and Fête Days excepted.

The plaintiffs' steamer was chartered by the defendants to carry a cargo of coals, "to be discharged at the rate of 200 tons per day weather permitting (Sundays and fête days excepted) according to the custom of the port of discharge and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved":—

Held, that Sundays and fête days were excluded both in the computation of the time allowed for discharging, and in that of the time saved, so that despatch money, by way of set-off to a claim for freight, was only payable, by the plaintiffs to the defendants, on the difference between the number of hours actually occupied by the defendants in the discharge, and the total number of hours which the charterparty allowed them.

Appeal by defendants, charterers, in an action for balance of freight, against the decision of the judge of the county court of Northumberland holden at Newcastle, disallowing in favour of the plaintiff shipowners the defendants' set-off of 20*l.* despatch money.

The facts were shortly that—

The steamship *Glendevon*, belonging to the plaintiffs, carried a cargo of 2103 tons of coals belonging to the defendants, the owners of the South Derwent Colliery, from Newcastle to Lisbon, under a charterparty dated November 17, 1892, the material portions of which were as follows: "The steamer to be discharged at the rate of two hundred tons per day weather permitting (Sundays and Fête Days excepted) according to the custom of the port of discharge and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved. . . . Demurrage twenty pounds for every day's detention in discharging and in same proportion for any part of such day over and above the days allowed as aforesaid except in case of riot or any hands striking work frost snow or floods or other accidents which may prevent the discharging of such steamer."

The discharge of the *Glendevon* was commenced at 7 A.M. on December 2, and completed at 5 P.M. on December 7, or (excluding

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Sunday, December 4) in 106 hours; but the time allowance for the discharge was 252 hours, which (excluding December 8, a fête day, and December 11, a Sunday) would bring the time for discharge up to 7 P.M. on December 15, and the plaintiffs, the owners of the *Glendevon*, therefore credited the defendants, the charterers, with 60*l.* 16*s.* 8*d.* for 146 hours' despatch. The defendants, however, included the fête day (December 8), and the Sunday (December 11), as also saved to the ship, making in all 194 hours saved; and they therefore claimed to deduct from the balance of freight due a further sum of 20*l.* for 48 hours' despatch. (1)

On July 5, 1893, the learned judge of the Newcastle County Court gave judgment for the plaintiffs, holding that "the contract between the parties should be read as excluding Sundays and fête days altogether from the calculation of despatch."

On appeal:—

R. H. Forster, for the appellants (defendants). The words "Sundays and fête days excepted" in the first part of the clause only apply to the rate per day at which the steamer is to be

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(1) The defendants' particulars of set-off shewed the time for discharge and the time saved, thus:—

For discharge:

17	hours on	December	2			
24	„	„	3			
—		„	4 (Sunday).			
24	„	„	5			
24	„	„	6			
24	„	„	7 Finished 5 P.M., and so 7 hours of that day saved.			
—		„	8 (Fête Day)	24	„	„
24	„	„	9	24	„	„
24	„	„	10	24	„	„
—		„	11 (Sunday)	24	„	„
24	„	„	12	24	„	„
24	„	„	13	24	„	„
24	„	„	14	24	„	„
19	„	„	15, up to 7 P.M.	19	„	„
252 hours allowed.				194 hours saved.		

Despatch allowed by plaintiffs on 146 hours.
Difference .. .. 48 „

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discharged, and have no reference to the latter part of the clause so that the fête day and Sunday between December 7, when the discharge was actually completed, and December 15, when the time allowed for discharge expired, must be included in favour of the charterer in the computation of the time saved, for the ship was able to go to sea 194 hours sooner, and therefore the plaintiffs gained that number of hours, and not merely the 146 hours which they are willing to allow.

The exception in the first part of the clause as to Sundays and fête days is for the protection of the charterer, to prevent his being obliged to employ men at extra rates of pay to work on those days or otherwise incur demurrage; but the latter part of the clause is inserted in the interest of the shipowner to induce the charterer to let the ship go as quickly as possible, and as the charterer discharged the vessel 194 hours sooner than he need have done, he is entitled to the 8*s.* 4*d.* per hour so saved. The reasoning of Bramwell, L.J., in *Laing* v. *Hollway* (1) is in favour of this interpretation of the clause, and this view is strengthened by the fact that there is no mention of Sundays and fête days in the demurrage clause, so that, as against the charterers, the shipowners after 7 P.M. on December 15, would claim for every day's detention without any allowance for days on which the charterers could not get the cargo discharged by reason of those days being holidays: *Niemann* v. *Moss.* (2)

Aspinall, Q.C., and *de Hart,* for the respondents (plaintiffs). The exception as to Sundays and fête days applies to the whole clause, and the meaning is that the steamer is to be discharged at the rate of 200 tons per day, excluding days on which the charterer, by no fault of his, is unable to work. The stipulation as to the 8*s.* 4*d.* per hour is in the nature of a premium to induce the charterer to save time out of the number of hours which the shipowner has agreed to allow him for the discharge, and it is at the charterer's option whether he will earn the despatch money or not. The words "weather permitting" shew that the appellants' contention cannot be correct, for if bad weather came on before the 252 hours were complete, but after the discharge was finished, then the charterer might claim despatch money for these days together with Sundays and fête days, and so run up a large sum as a set-off against freight. The case of *Laing v. Hollway* (1) is not in point, as it only decided that twenty-four and not twelve hours was a working day. The clauses as to despatch money and demurrage have no relation to one another: the former relates to a reward to be earned by the charterer if he pleases; the latter refers to the compensation due to the shipowner by reason of the failure of the charterer to perform his contract.

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(1) 3 Q. B. D. 437, at p. 441.

(2) 29 L. J. Q. B. (N.S.) 206.

R. H. Forster, in reply. The words "weather permitting" do not affect the question as to the time saved, for bad weather is only taken into account when it arises during the discharge—that is, when it has actually prevented the work of discharge being carried on. The despatch money is calculated directly the ship is out of the charterer's hands and ready for sea. The principle upon which demurrage and despatch money are calculated is much the same, as the former is compensation paid by the charterer for time during which the ship might be earning freight under another contract, and the latter is paid to the charterer to induce him to enable the steamer to earn fresh freight under another contract.

THE PRESIDENT (SIR F. H. JEUNE). No question has been raised as to the jurisdiction to hear this appeal, and therefore in this case we need not discuss that matter. The only point for our decision arises under the clause in the charterparty. [The learned judge read the clause, and the particulars of the defendants' set-off, already set out, and continued:—] The question is whether despatch is to be counted in respect of the twenty-four hours of December 8, which was a fête day, and the twenty-four hours of December 11, which was a Sunday—that is, forty-eight hours in all at 8*s*. 4*d*. per hour, making the 20*l*. claimed by the defendants by way of set-off against the freight. Reliance was placed on the case of *Laing* v. *Hollway* (1), but it was conceded in argument, and could not be denied, that the actual decision is not one that bears on the present case, because in that case the only question that was really decided was that

(1) 3 Q. B. D. 437.

the length of the day was to be taken at its real and actual length of twenty-four hours. There were, however, two expressions in the judgment, on both of which reliance was placed, and which might at first sight seem to have a bearing on the question. Bramwell, L.J., said (1): "The owner would sail away by what has happened 216 hours sooner than he would have done, but for the defendant's despatch," and (2) "It was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the despatch money?" I do not think that either of these phrases really lend themselves to the argument put forward by the appellants in this case. I am by no means sure, even on the test of the time saved to the steamer, that Sundays or fête days should be taken in, because, though in some cases they might be days available for the steamer's purposes, in other cases they would only be so partly, and possibly not at all. But the argument which the counsel for the respondents has put as regards the other exception in the clause appears to me to be unanswerable. They point out that days, during which the weather does not permit discharge, stand on the same footing as regards the charterer's right as Sundays and fête days; that is to say, the charterer need not discharge on Sundays and fête days, and need not discharge if the weather does not permit on other days, but if Sundays and fête days are to be reckoned in as time saved for the purpose of the payment of despatch money, then the days during which the weather does not permit discharge ought to stand on the same footing. I confess I am unable to see any answer to that argument, and the results would be so extraordinary as to be unintelligible. It would come to this, that after the ship was discharged, the charterer would have the right to say that on a large number of days, it might be even weeks or months, he was prevented by the weather from discharging, and therefore he was entitled to add these in as days of twenty-four hours, for each hour of which he was entitled to have 8*s.* 4*d.* That is an absurdity.

Then there is the other argument, that demurrage and despatch stand on the same footing; but, as has been pointed out, they do not by any means so stand. In the first place, demurrage is governed by a separate clause from that governing the despatch money, and the demurrage clause contains no exception of Sundays and fête days; nor would one expect that it would, because, as has been pointed out, demurrage is fixing damages for breach of contract when time is lost to the steamer. The result, therefore, to which I come is, that on the true construction of this charterparty the 8*s.* 4*d.* an hour is to be paid for the time saved out of the discharging hours, and that discharging hours are to be taken with the exceptions in the clause.

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(1) 3 Q. B. D. at p. 441.

(2) 3 Q. B. D. at p. 442.

The result is, that it appears to me that the judgment of the Court below is right, and that this appeal must be dismissed.

GORELL BARNES, J. As no point has been taken as to the right of the defendants to appeal in this case, we have only to consider whether the plaintiffs' mode of calculating the number of hours saved is correct. By the earlier words in this clause in the charterparty, [the learned judge read the clause and continued :—] the total amount of time allowed for the discharge of the steamer is fixed, and amounts to 252 hours, and out of that number of hours only is any saving of time to be reckoned. This is neatly put in the judgment of the learned county court judge, where he says: "The 'rate of 200 tons per day' means for working days, and every hour saved means every hour saved out of a fixed or ascertainable number of working days, viz., 252 hours, which exclude Sundays and fête days."

Any other construction would lead to difficulty, and I agree in thinking that the judgment below should be affirmed.

Appeal dismissed.

R. H. Forster, on behalf of the defendants, asked for leave to appeal.

THE PRESIDENT. No.

Solicitors for appellants (defendants): *King, Wigg & Co., for Clayton & Gibson, Newcastle-upon-Tyne.*

Solicitors for respondents (plaintiffs): *Botterell, Roche, & Temperley Newcastle-upon-Tyne.*

T. L. M.

THE ROUGEMONT.

1893
July 24, 25.

Admiralty—Damage by Collision—Principal Cause—Cross Cause—Practice—Security—Admiralty Court Act, 1861 (24 & 25 *Vict. c.* 10), *s.* 34.

By s. 34 of the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10): "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if, in the principal cause, the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause."

In a collision between the plaintiffs' and the defendants' steamers the former was damaged and the latter sunk. The plaintiffs issued a writ in personam against the defendants. The defendants issued a writ in rem against the plaintiffs' vessel, and bail was given by the plaintiffs to prevent her arrest. The two actions were consolidated, and the defendants were made counter-claimants. The plaintiffs applied for security to be given by the defendants:—

Held, that there was no power under s. 34 of the Act of 1861 to grant the application.

Appeal summons (adjourned into Court) by plaintiffs in an action of damage by collision against the refusal of the registrar to stay proceedings until the defendants, as counter-claimants, gave security for 1500*l.*

The facts were shortly that:—

On June 10, 1893, a collision occurred in the Kattegat between the steamships *John Readhead* and the *Rougemont*, the result being that the former vessel sustained considerable damage, and the latter sank.

On June 12 the plaintiffs, as owners of the *John Readhead*, issued a writ in personam against the defendants, Messrs. J. Cory & Sons, the owners of the sunken vessel *Rougemont*, marked in the cause-book fol. 309. About ten minutes later the defendants, as owners of the *Rougemont*, issued a writ in rem against the plaintiffs' vessel, marked in the cause-book fol. 310. Bail in the sum of 13,000*l.* was given by the plaintiffs, as owners of the *John Readhead*, to answer the latter action; but the defendants, as owners of the *Rougemont*, declined to give security to answer the plaintiffs' action.

On June 17, on the application of the plaintiffs, a consolidation order was made, by which the plaintiffs were to continue their action against the defendants, and their solicitors to have the conduct of the action, and the defendants were to be counter-claimants against the plaintiffs, as owners of the *John Readhead*. On July 4 application was made by the plaintiffs to the registrar to stay the defendants from proceeding on their counter-claim until they had given security to answer the claim of the plaintiffs.

The registrar declined to make the order, on the ground that the plaintiffs were not within s. 34 of the Admiralty Court Act, 1861 (1), and, therefore, there was no precedent for it.

On appeal,

Arthur Pritchard, for the plaintiffs, the owners of the *John Readhead*. It is submitted that on equitable grounds the proper course, in this case, would be to stay the defendants' proceedings until security be given, for if the present defendants, in the consolidated action, had been plaintiffs and had had the conduct of the cause, the Act of 1861 would have applied to them, and it would not be equitable that the highly technical objection based on the wording of the statute is to oust the present plaintiffs of their right to security.

The object of the Act of 1861 was to extend the jurisdiction and improve the practice of the High Court of Admiralty, and it should therefore be construed liberally. The grievance which s. 34 was intended to remedy was that one party had security for his action whilst the other had none, and many attempts were made to meet this grievance. In 1839 in *The Johann Friederich* (1), a case of collision between foreign vessels on the high seas, the jurisdiction was objected to on the ground that there was no security in case of a cross action, and the Court required bail to answer any cross action that might be instituted before the action was allowed to proceed. In 1848 in *The Seringapatam* (2), where a motion to stay proceedings until bail was given was reluctantly refused for want of jurisdiction, the Court observed, that as one party had obtained security, the same security ought to be exacted in favour of the other party. In 1860 in *The Heart of Oak* (3) a similar application was made, and the Court made similar observations. The statute was then passed to put the parties on an equality as regards security: *The Cameo* (4); *The Charkieh* (5); *The Newbattle* (6); but, if this narrow interpretation is to be put upon the words, the statute will fail in its object where the facts are as in the present case.

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(1) 24 & 25 Vict. c. 10, s. 34 : "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause."

No distinction can be drawn on the ground that the plaintiffs' action is in personam, as, where the other vessel has gone to the bottom, only an action in personam can be entered. Formerly the owner of a British vessel which had run down a foreign vessel had no remedy in the first place against the foreign owner in the Court of this country, although the foreign owner might take proceedings in rem against the British owner, and require bail to answer the foreign owner's action. The result was that the action of the foreign owner was always the principal action, and the Court held that even when a cross action was instituted, the foreign owner's action could not be stayed until he had entered an appearance in the cross action: *The North American—The Tecla Carmen* (7); though it was the practice of the Court, where in the principal action both were held to blame, to withhold payment of the moiety of the damage sustained by the plaintiffs' ship until the plaintiffs in that action submitted to the deduction of a moiety of the damages sustained by the other ship or suffered the cross action to be prosecuted. In that state of things rule 171 of the Admiralty Court Rules, 1859, was passed (1), and was followed by s. 34 of the Admiralty Court Act, 1861.

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(1) 1 W. Rob. 35.

(2) 3 W. Rob. 38, at p. 41 n.; 6 Notes Cases, 165.

(3) 29 L. J. (Ad.) 78.

(4) Lush. 408.

(5) Law Rep. 4 A. & E. 120.

(6) 10 P. D. 33.

(7) Lush. 79.

The words "defendant," "principal" cause, and "cross" cause no doubt lend colour to the argument that this application is not maintainable on the ground that the defendants' action cannot, under the Act, be the "principal" cause; but the real question is, which is the most important cause? The defendants' cause is that in which the res is, and the defendants are claiming the larger damages, for, as owners of the *Rougemont*, they are claiming the whole value of their ship. The defendants' cause is, therefore, the principal cause, and, if so treated, then the plaintiffs will be entitled to the security asked for.

The question cannot be determined by the mere fact of consolidation, for otherwise the rights of parties would be affected by what is merely a mode of procedure adopted to avoid multiplicity of pleadings and interlocutory proceedings, and, if necessary, the Court can re-open the consolidation order: *The William Hutt.* (2) At the time of the passing of the Admiralty Court Act, 1861, cross actions, though usually tried at the same time and on the same evidence, were not consolidated. There was a separate decree in each case: *The Annapolis.* (3) The procedure by way of counter-claim is a creature of the Judicature Acts, and was unknown at the time of the passing of the Act of 1861. By Order XIX., r. 3, of the Rules of the Supreme Court, a counter-claim is to have the same effect as a cross action, and claim and counter-claim are, for all purposes, except execution, two independent actions. By setting up a counter-claim the defendants are in the same position as plaintiffs originating an action: *The Julia Fisher.* (4)

Again, accidental and momentary priority cannot settle the point, for if that were so, then a few minutes' difference in time in the issue of the writs would affect the rights of the parties by determining which was the "principal" and which was the "cross" cause. In this case the issue of the writs was practically simultaneous, and might be actually so, if the actions were entered at the same time, at different places, as, for example, if one action were entered in London, and the other in the Liverpool District Registry. In the Queen's Bench Division the time of the issue of the writ does not settle the question, for in *Thomson* v. *South Eastern Ry. Co.* (1) the action subsequent in date was allowed to proceed on the ground that the burden of proof lay upon the plaintiff in that action, and the plaintiffs in the first action were made defendants and counter-claimants. If priority of time is to settle the matter, then a party will be encouraged to delay bringing his action, as otherwise he will be unable to avail himself of the benefit of the statute.

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(1) Admiralty Court Rules, 1859 (annulled by the Rules of the Supreme Court, 1883, except so far as no other provision is made by the Judicature Act or the Rules, Order LXXII., r. 2):—

"No. 171. Where a party is suing in a damage cause, and a cross cause in personam is instituted, the service of the citation in the cross cause may be made on the proctor of the party suing in the original cause, and such service shall be sufficient."

(2) Lush. 25.

(3) Lush. 295, at p. 313.

(4) 2 P. D. 115.

[Counsel for the plaintiffs also referred to the following cases:—*The Amazon* (2); *The Normandy* (3); *The Carlyle* (4); *The Carnarvon Castle* (5); *The Alne Holme* (6); *The Alexander.* (7)]

Sir Walter Phillimore, for the defendants. The plaintiffs cannot bring themselves within the terms of s. 34 of the Admiralty Court Act, 1861, as that section will only apply if the owners of the sunken ship, that is, in this case, the defendants, first take action and are plaintiffs; but here the owners of the vessel (the *John Readhead*) which was not sunk have instituted the "principal" cause. The plaintiffs can obtain the security they want by consenting to give up the conduct of the cause and take the position of defendants. [Counsel referred to the case of *The Calypso.* (8)]

Cur. adv. vult.

July 25. GORELL BARNES, J. The cause of this application is, that the plaintiffs, suing Messrs. Cory & Sons, in personam, because the ship of the defendants is lost, have nothing which they can arrest; but the defendants, the counter-claimants, are able to arrest, and have arrested, or accepted bail for, the ship of the plaintiffs, and the object of the application is to enable the plaintiffs to have security from the defendants for the plaintiffs' claim, in the same way as the defendants have security by the arrest of the plaintiffs' ship for their counter-claim. The question whether or not this application can succeed depends simply upon the construction of the 34th section of the Admiralty Court Act, 1861.

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(1) 9 Q. B. D. 320.
(2) 36 L. J. (N.S.) Ad. 4.
(3) Law Rep. 3 A. & E. 152.
(4) 6 W. R. 197.
(5) 3 Asp. M. L. C. 607.
(6) 4 Asp. M. L. C. 591.
(7) 5 Asp. M. L. C. 89.
(8) Swa. 28.

The case was extremely well argued by counsel on behalf of the plaintiffs, and a number of authorities were cited; but in the course of his argument he was forced to admit that there was no case which really governed the present question, or, in fact, directly touched upon it, although the Act has been in force for the last thirty-two years; and so far as I have been informed by counsel, there is no case in which a similar application has been made during the whole of that period. Now, the 34th section of the Admiralty Court Act of 1861 runs as follows: [The learned judge read the section, and continued:—] If this case had stood under the old practice before the Judicature Act, the plaintiffs' case of the *John Readhead* against Cory & Sons, the defendants in personam, would be undoubtedly the principal cause, and the case instituted afterwards by those defendants against the plaintiffs would be undoubtedly the cross cause, and I do not think that it would be possible to construe the Act of Parliament in favour of this application if the matter remained under the old practice. But it is contended that at the present day, where the parties are in the position of claimant and counter-claimant, in one action, the counter-claimant's counter-claim may be treated as the principal cause, and the plaintiff's claim be treated as the cross cause.

It is difficult to see how it is possible to arrive at that result, at any rate in a case in which the plaintiffs commence their action in personam, and afterwards are sued by arrest of their ship in rem, whatever might be the result if a different state of proceedings had taken place.

In dealing with this case, it will be seen that the words of the section are not applicable because they run thus: "and if in the principal cause the ship of the defendant has been arrested."

1893

THE ROUGEMONT.

Gorell Barnes, J.

The principal cause here, I think, is the cause instituted by the plaintiffs in personam, in which, of course, the defendants' ship could not be arrested, and then it goes on: "And in the cross cause the ship of the plaintiff cannot be arrested"; but in the cross cause here the ship of the plaintiffs is arrested or can be arrested—"the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause." I think, therefore, that, although it is really desirable, if I could construe the Act so as to permit of it, that both parties should be placed in the same position, the Act, it seems to me, would really fail to meet this state of things, though where the plaintiff commences the suit in rem against the defendant and is the attacking party, and the defendant is not able to arrest the plaintiff's ship, and, therefore, to get any security from him, he is entitled to say: "I will ask the Court to stay the proceedings of the plaintiff until he has secured me in the same way as I have secured him." That is the object with which this clause was drawn, and it does not, though it might have done, go so far as to deal with the case of the plaintiff commencing the attack in personam, and the defendant then arresting the plaintiff's ship, and the plaintiff then applying to stay the defendant's cross action or counterclaim, whichever it is, until the defendant has given security for the plaintiff's claim. For these reasons, I think that, having regard to the way in which the actions are instituted, and without thinking it necessary to decide what might be the case under other circumstances, the appeal in this case must fail and be dismissed with costs.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

1893
July 31.

IN THE GOODS OF HINE.

Probate—Torn Will—Grant—No Notice to Persons interested in Intestacy—Security for Share of Absentee.

Upon an application by the widow of a testator for probate it appeared that while suffering from softening of the brain he had torn his will in pieces, and that the pieces had been collected and pasted together. The will left the estate to his wife for life, and after her death to his two sons, who were both abroad. The eldest son had advised his mother to take out probate; but no notice of the application had been given to the younger son:—

Held, that probate might be granted to the widow on her giving security for one-third of the personal estate of the deceased, to cover the share to which the younger son would be entitled in the case of an intestacy.

MOTION for probate of a torn will.

The testator, Henry Hine, deceased, died on April 9, 1893, leaving his wife and two sons him surviving.

On October 5, 1892, he executed a will, leaving all his property to his wife for life, with remainder to his two sons in equal shares, and he appointed his widow and his said sons trustees and executors.

In November, 1892, the testator became ill, and his illness developed into softening of the brain. His relatives were warned, on March 3rd, to watch him very closely, owing to his serious mental condition, and, on the day following, he obtained possession of his said will, and proceeded to tear it in pieces.

The pieces were afterwards pasted together, and the widow now applied for probate of the will. Both the sons were stated to be abroad; but the elder had written to his mother, advising her to apply for probate of the will.

Bargrave Deane, for the widow, moved for probate, and stated that the widow was willing, if probate were granted to her, to give security for the share to which the younger son would be entitled in case of an intestacy. He would thus be protected, in case he should, when the facts came to his knowledge, see fit to institute proceedings for revocation of the probate.

THE PRESIDENT. I think, as she is willing to give security for one-third of the personal estate, that there can be no objection to acceding to this application. I therefore grant probate to the widow, as executrix.

Solicitors: *Saw & Son.*

W. L.

In the Goods of ANSTEE.

1893
Aug. 12.

Probate—Will—Execution—Foot or End—Probate of Part only.

The signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will—immediately after an unfinished sentence, which was completed overleaf on the second page:—

Held, that probate might be granted of the first page of the will.

Motion for probate.

The document, which was not dated, was on a printed form partially filled up with writing. The testator thereby revoked all former wills, appointed two of his sons executors, and directed them to pay his debts and funeral expenses as soon as might be after his decease. He gave to his children all his property, both real and personal, and directed that, after having his farming stock and implements valued, his executors were to be at liberty to carry on his farm and were to divide the proceeds between all his ten children. The will concluded as follows: "And I direct that, in carrying on my farming business as aforesaid, for the said time the farm is carried on, no sales or purchases shall be made without the consent of my said executors and trustees, and all cheques to be paid away shall be"—then followed a full attestation clause, and, opposite thereto, the signature of the testator and the signatures of the two attesting witnesses. This filled up the remaining space at the foot of the front page of the will. Overleaf, on the second page, the unfinished sentence was completed as follows:—"signed by my daughter Emma, and all accounts shall be settled by her. In witness whereof I have hereunto set my hand."

Searle, on behalf of the executors, moved for probate. The disposing parts of the will are not affected by the writing on the second page. The daughter Emma is not an executrix, but she would have power to stop all sales.

[The President. Does not the will make her an executrix?] That is doubtful, in view of the express appointment of two of the sons as executors in the earlier part of the will. The three lines on the second page are clearly not admissible, and

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IN THE GOODS OF ANSTEE.

the executors, therefore, ask for probate of the first page only. The widow, who is the only person competent to raise any objection, consents to the motion.

THE PRESIDENT. I grant probate of the will down to the bottom of page 1 only.

Solicitors: *Dawes & Sons.*

W. L.

C. A.

1893

June 30.

[IN THE COURT OF APPEAL.]

WATERHOUSE *v.* WATERHOUSE.

Divorce—Decree nisi—Petition for Maintenance—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32.

The effect of s. 32 of the Matrimonial Causes Act, 1857, and the Rules and Regulations made under the provisions of the Divorce Acts, is to enable the Court, before a decree nisi for divorce has been made absolute, to confirm the report of the registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife upon the decree becoming absolute, and in the meantime to restrain him from dealing with his property so as not to leave sufficient security.

APPLICATION to confirm the report of the registrar in a petition by a wife for maintenance under s. 32 of the Matrimonial Causes Act, 1857.

It appeared that a petition was presented by the wife for dissolution of marriage on the ground of cruelty and adultery, and a decree nisi pronounced on March 14, 1893. After the decree nisi had been made, the petitioner presented a petition under s. 32 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), for maintenance.

Under the marriage settlement of the parents of the respondent, he was absolutely entitled in reversion expectant on the decease of his mother to one-fourth share of certain funds of the aggregate value of about 20,000*l.* He had incumbered his share to the amount of upwards of 1600*l.* The registrar reported on the petition that it was reasonable that the respondent should be ordered to secure to the petitioner 1000*l.* by a charge to that amount upon such of his property as might be unincumbered.

The petitioner's solicitor received information that the respondent and his mother were about to make an arrangement for realizing the respondent's share of the trust funds and dividing it between them. The petitioner applied to the judge to confirm the report and make an order which would charge the property, as otherwise there was great danger of the property being made away with. The judge, however, felt a difficulty as to his having jurisdiction to make such an order. The application was therefore renewed before the Court of Appeal. Notice was not served on the respondent, who kept out of the way. It had been necessary on several occasions to obtain orders for substituted service, and it was desired to avoid the delay of taking this course on the present occasion.

Bargrave Deane, for the application. The judge doubted whether he had jurisdiction to make an order under 20 & 21 Vict. c. 85, s. 32, till the decree had been made absolute. There is no doubt that originally the expression "such decree" in that section meant a decree absolute, for the Act made no provision for a decree nisi, and a decree under it was always absolute. The decree nisi was introduced by 23 & 24 Vict. c. 144, s. 7, made perpetual by 25 & 26 Vict. c. 81, s. 1. If the petitioner could only rely on s. 32, there would be a difficulty; but the General Rules and Regulations of December 26, 1865, which were made after the introduction of the decree nisi, remove this difficulty. Rule 96 provides that a petition for maintenance under s. 32 may be filed as soon as a decree nisi has been pronounced. When the pleadings are complete they are to be referred to a registrar who is to make his report, and then, under rule 102, an application may be made to the judge ordinary for an order to confirm the report and carry out the prayer of the petition. There is nothing in the rules to shew that these proceedings are to be suspended or delayed because the decree has not been made absolute. It is not contended that an order immediately enforceable can be made before the decree is absolute, but the Court can at once confirm the registrar's report, and make an order for payment to take effect when the decree is made absolute, and in the meantime grant an injunction to restrain the respondent from making away with his property so as to defeat the order. The Court has seisin of the estate on the petition being filed. In *Marris* v. *Marris* (1), an order was made before the decree absolute, the judge saying that it would become effective in that event.

[LOPES, L.J. Is not *Newton* v. *Newton* (2) against you?]

No; it only decides that there cannot be an injunction where no order has been made, but does not bear on the jurisdiction to make such an order.

LINDLEY, L.J. We see our way to make an order. Sect. 32 obviously refers to a decree absolute for dissolution, as a decree nisi was unknown at that time. But when we look at the General Rules and Regulations, which were made after the procedure had been altered by 23 & 24 Vict. c. 144, we find by rule 96 that a petition for maintenance may be filed as soon as a decree nisi has been pronounced. What is to be done upon it? The pleadings when complete are to be referred to the registrar, who is to make a report on the subject of the petition; and then rule 102 provides: "The report of the registrar shall be filed in the registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar, and either of the parties, within fourteen days after such notice has been given, if the judge ordinary be then sitting to hear motions, otherwise on the first day for motions after the expiration of fourteen days, may be heard by the judge ordinary on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same and to carry out the prayer of the petition." That shews that it was contemplated that an application might be made for an order of some kind before the decree was made absolute. The present case is a peculiar one. The husband is entitled to considerable property subject to the life interest of his mother, and there is reason to believe that he is making away with it. There is difficulty in serving him, as he keeps out of the way. The registrar has made a report that

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(1) 31 L. J. (P. & M.) 33; 2 Sw. & Tr. 530.

(2) 11 P. D. 11.

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it is reasonable that the respondent should secure to the petitioner 1000*l.* on his property. We are asked to make an order which will operate as a charge upon the respondent's property and prevent his making away with it. This we can do, and we make an order confirming the report, and ordering the respondent, within one week after the decree is made absolute, to secure to the petitioner 1000*l.*, and restraining him in the meantime from dealing with the property. As the respondent has not been served, we give him liberty to apply on short notice to discharge or vary this order. The order must be served on the trustees in whom the property is vested.

LOPES, L.J. I agree.

A. L. SMITH, L.J. I am of the same opinion. I agree that this order may be made, and our confirming the report approving of maintenance gets over the difficulty which was felt in *Marris* v. *Marris*. (1)

FORM OF ORDER.—" The Court confirmed the registrar's report, and ordered that the respondent do within one week after making the decree absolute herein secure to the petitioner the sum of 1000*l.*, and that until then the respondent be restrained from parting or otherwise dealing with so much of his property mentioned in the report as will not leave sufficient to secure the said sum of 1000*l.* With liberty to the respondent to apply upon short notice to discharge the said order, and that service of the said order upon the respondent be dispensed with, and that the said order be served upon the respondent's solicitors."

Solicitor: *J. B. Somerville.*

(1) 31 L. J. (P. & M.) 33; 2 Sw. & Tr. 530.

H. C. J.

1893
July 17.

GRIEVE *v.* GRIEVE (QUEEN'S PROCTOR INTERVENING).

Divorce—Wife's Suit—Decree Nisi—Intervention by Queen's Proctor—Refusal to allow the alleged Adulterer to intervene.

A wife obtained a decree nisi, but the Queen's Proctor subsequently intervened, and alleged that the petitioner was living in adultery with one D. J.:—*Held* (in chambers), that D. J. was not a party to the suit, and could not be admitted to intervene.

MOTION for leave to intervene in a divorce suit. Mrs. Grieve, the petitioner, had obtained a decree nisi, and subsequently the Queen's Proctor intervened and charged her with living in adultery with David Jones.

David Jones took out a summons for leave to intervene and defend himself in the suit, which was dismissed by the registrar.

On appeal to the President in chambers,

R. H. Pritchard, submitted that Jones was a party within the meaning of s. 2 of 41 & 42 Vict. c. 19, and, as he must be condemned in costs if a party, he ought to have an opportunity of being heard.

[THE PRESIDENT. I think *Crawford* v. *Crawford and Dilke* (1) decides that he is not a party.]

But in that case the issue against the respondent had been decided and he had been dismissed from the suit.

[THE PRESIDENT. Lord Hannen's judgment refusing Sir C. Dilke leave to intervene did not go on that ground. Was it the practice before the Divorce Act in suits for separation à mensâ et thoro to allow the person who was charged with adultery to intervene?]

No; and that was the reason why Parliament required a husband to bring an action for crim. con. before introducing his bill. [He referred to *Wheeler* v. *Wheeler and Rhodes.* (2)]

THE PRESIDENT held that, though it seemed reasonable that a person charged with adultery should be heard, the summons

(1) 55 L. T. 305; 11 P. D. 150.

(2) 14 P. D. 154.

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must be dismissed on the ground that there was no precedent or authority for such an application.

The Queen's Proctor did not ask for costs.

Solicitors: *Cunliffes & Davenport.*

W. L.

SHINE *v.* SHINE.

1893
July 24.

Divorce—Attachment—Costs—Undischarged Bankrupt—Order

The respondent—the husband—in a suit for divorce was an undischarged bankrupt, but was shewn to be in receipt of a weekly salary of 30*l.*, which was not under the control of the trustee in bankruptcy.

An order had been made by the Court, and duly served on him, to pay into Court or give security for the sum of 40*l.*, to cover the wife's costs of the hearing of her petition; but although nearly two years had elapsed from the date of such order he had failed to comply with it:—

Held, that the fact that the respondent had been adjudged bankrupt did not preclude the Court from issuing an attachment—and the Court made an order accordingly.

MOTION for attachment.

On August 7, 1891, an order was made that the respondent, John Lloyd Joseph Aloysius Shine, should lodge in Court a sum of 40*l.*, or, in the alternative, give a bond with two sureties in the sum of 80*l.* to meet the estimated costs of the hearing of a divorce petition presented against him by his wife, Annie Louisa Shine. The respondent failed to comply with this order, and the cause had been stayed on that account, the petitioner having no means of her own.

On August 23, 1891, the respondent was adjudicated bankrupt, and was still without an order of discharge.

He was an actor of repute, earning a weekly salary of 30*l.*, which was not under the control of the trustee in bankruptcy.

The respondent was personally served with a duly indorsed copy of the order for costs, and of the notice of motion and affidavits in support thereof; but he did not appear to oppose the motion. An affidavit of the managing clerk to the petitioner's solicitors shewed that the respondent lived at a villa on the Thames, and kept a horse and trap and a groom.

Durley Grazebrook, for the petitioner, moved the Court to issue an attachment against the respondent. The fact that the respondent is an uncertificated bankrupt does not, per se, preclude the Court from granting this application. His means are shewn from the report of *In re Shine* (1), and from the affidavit of the managing clerk to the petitioner's solicitor, which stands uncontradicted.

THE PRESIDENT. The motion is in order, and I am satisfied that the respondent has means and can comply with the order if he chooses. I think, therefore, that *Bates* v. *Bates* (2) applies, and order that the writ of attachment do issue, but that it lie in the office for seven days. The respondent must pay the costs of this application.

Solicitors for the petitioner: *Champion & Sons.*

W. L.

1893
July 24; *Aug.* 10.

FLOWER *v.* FLOWER AND OTHERS.

Divorce—Queen's Proctor's Intervention and Appearance—No Plea filed—Resumption of Cohabitation—Decree Nisi rescinded.

The petitioner had obtained a decree nisi dissolving his marriage on the ground of his wife's adultery. Subsequently, his solicitors informed the Queen's Proctor that he had forgiven his wife and taken her back to live with him, and that he did not intend to take steps to have the decree made absolute.

On affidavits from the husband and wife that they were living together again, the Court made the usual order rescinding the decree and dismissing the petition without requiring the Queen's Proctor to file a formal plea.

MOTION by the Queen's Proctor to rescind a decree nisi.

John Flower, of Bedminster, near Bristol, filed his petition for divorce in October, 1892, upon the ground of his wife's adultery.

No answers were filed by the respondent or co-respondents, and, on March 27, 1893, a decree nisi was pronounced.

Before the Queen's Proctor had instituted any inquiries beyond the Registry, he received a letter from Messrs. Gregory & Hirst, of Bristol, the petitioner's local solicitors, stating that the petitioner had forgiven his wife's misconduct and had resumed cohabitation with her; and that, under these circumstances, he did not, of course, intend to apply to have the decree made absolute.

(1) [1892] 1 Q. B. 522.

(2) 14 P. D. 17.

The Queen's Proctor entered an appearance, and, some time later, was informed by the solicitors on the record, who were the London agents of Messrs. Gregory & Hirst, that they, too, had heard from the latter to the same effect.

Under these circumstances, the Queen's Proctor, in order to save further expense, filed his motion in the usual form, without putting in any plea.

Durley Grazebrook, on behalf of the Queen's Proctor, moved to rescind the decree nisi and dismiss the petition. The filing of a plea in a case like this would be a useless and unnecessary expense. No application has been made by the petitioner to get rid of the decree and the petition, and this application was thought to be the most expeditious and least expensive mode of disposing of the case. An application was recently made by a petitioner, upon summons in chambers, to rescind a decree nisi obtained by him, and an order was, with considerable hesitation, made in that case. It is, however, submitted that a decree which has been pronounced publicly, in open Court, should only be rescinded by an equally public and formal proceeding.

THE PRESIDENT. I think that is so. I am disposed to accede to the present application; but I do not see any direct evidence of resumption of cohabitation. It rests upon the statements of the solicitors alone. I will adjourn the motion, in order that the Queen's Proctor may obtain direct evidence of the fact that the petitioner and respondent are living together.

Aug. 10. *Durley Grazebrook*, renewed the application upon affidavits sworn by the petitioner and respondent, stating that on May 7, 1893, a reconciliation was effected between them, and that they had, since that time, been living together as man and wife at the petitioner's house at Bedminster.

THE PRESIDENT thereupon rescinded the decree nisi, and dismissed the petition.

The Queen's Proctor did not ask for costs.

Solicitor: *The Queen's Proctor.*

W. L.

C. A.

1893

July 19, 24;
Aug. 7.

[IN THE COURT OF APPEAL.]

BERNSTEIN *v.* BERNSTEIN.

Divorce—Condonation—Claim for Damages after Condonation—Divorce and Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *sub-ss.* 30, 33, 59.

At the trial of a petition by a husband for divorce, on the ground of the adultery of his wife with two co-respondents, and claiming damages against one of such co-respondents, the jury found that the respondent had been guilty of adultery with both co-respondents, but that the petitioner had condoned the adultery with the one against whom damages were claimed, and that no damages were payable by such co-respondent in respect of the adultery committed by him. It appeared that the condonation was subsequent to the adultery with both co-respondents, and that at the time of the condonation the petitioner did not know of the adultery with the other co-respondent. A decree nisi was granted by the President, on the ground of the adultery with the co-respondent whose adultery had not been condoned; but as against the other the petition was dismissed with costs:—

Held, by the Court of Appeal, that the decision of the President was right; for that a condonation by a husband of adultery with one person is not avoided by the fact that the wife had previously to the condonation committed acts of adultery with another person of which he was not aware; and that, although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer, but only went in mitigation of damages, the case is different under the Divorce and Matrimonial Causes Act, 1857; and where, on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery has been condoned, the petitioner is not entitled to a judgment, even for nominal damages, against the co-respondent; but the petition will be dismissed, and the petitioner may be ordered to pay the co-respondent's costs.

Story v. *Story* (12 P. D. 196) approved. *Pomero* v. *Pomero* (10 P. D. 174) overruled.

Motion for a new trial in a petition for divorce.

This was a petition by a husband praying for a divorce from his wife, on the ground of her adultery with the two co-respondents, Sampson and Turner, and claiming damages against Turner.

The respondent and the co-respondents denied the acts of adultery, and the co-respondent Turner alleged that the petitioner had condoned the adultery (if any) committed with him.

At the trial the jury found that the respondent had been guilty of adultery with both the co-respondents, that the petitioner had condoned the adultery with Turner, and that no damages should be paid by Turner in respect of the adultery committed by him. The condonation was subsequent to the adultery with both Sampson and Turner, and it was proved that at the time of the condonation the petitioner did not know of the adultery with Sampson.

The President granted a decree nisi on the ground of the adultery with Sampson, and gave costs against him. The learned judge dismissed the petition as against Turner with costs.

The petitioner gave notice of motion before the Court of Appeal for an order for a new trial on the ground that the judge ought to have directed the jury, first, that there was no evidence to support Turner's answer alleging condonation; second, that Turner was not entitled to rely on condonation as an answer to the claim for damages; third, that they must assess some damages. Or in the alternative, for an order varying the judgment, on the ground that the judge was wrong, upon the findings of the jury, in dismissing the petition as against Turner with costs.

July 19, 24. *Henry Kisch*, and *H. J. Turrell*, for the petitioner. Condonation can only be a bar to a petition for divorce where there is knowledge of all acts of adultery committed up to the time of such condonation. The precise point has never been decided; but in *Dempster* v. *Dempster* (1) views tending that way are expressed. A husband may be willing to forgive one offence, which he may consider to have been committed under peculiar circumstances, but might not forgive it if he were aware that the wife had committed adultery with several other persons. *Turton* v. *Turton* (2) and *Bramwell* v. *Bramwell* (3) support the view that condonation is conditional on knowledge of all the guilt of the party forgiven. In *Alexandre* v. *Alexandre* (4) the contrary view was assumed to be the correct one; but *Dempster* v. *Dempster* (1) was not cited, nor was the point argued. The President was in error in considering that the Matrimonial Causes Act, 1857, affected the question. Sect. 27 authorizes a petition for dissolution, and "such petition" in the latter part of the section means a petition for dissolution. Sect. 28 enacts

(1) 2 Sw. & Tr. 438.
(2) 3 Hagg. 338, 351.
(3) 3 Hagg. 618, 629.
(4) Law Rep. 2 P. & D. 161.

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that on any "such petition" the alleged adulterer shall be made a co-respondent. Sect. 29 enacts that the Court must satisfy itself whether the petitioner has condoned the adultery, and s. 30 makes it imperative to dismiss the petition if condonation is established. There is nothing in this to affect the question what constitutes an effectual condonation. Suppose a woman has committed adultery under circumstances which lead her husband to forgive her, and he afterwards finds out that she has committed adultery with other persons under such circumstances that he cannot find legal evidence against them, it would be hard that he should be tied to her for life. The judge ought, therefore, to have told the jury that there was no evidence of condonation.

Secondly, condonation is no answer to a claim to damages, and the husband, if adultery is proved, has a right to nominal damages, if nothing more. It follows, therefore, that the judge was wrong in dismissing the petition as against Turner and ordering the petitioner to pay his costs. The Divorce Act of 1857, s. 33, provides that claims for damages under the Act shall be tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation at the time of the Act coming into operation were tried in Courts of Law. This section applies whether the petition asks for dissolution and damages, or for damages only, and its language is strong in the direction of assimilating the proceedings on the claim for damages to the old action of crim. con. It is, therefore, necessary to see whether condonation was a defence under the old procedure. This it clearly was not, and if not, it can be no defence now against a claim for damages: *Pomero* v. *Pomero* (1) expressly decides this. Under the old law condonation was no defence, but only went in mitigation of damages: *Howard* v. *Burtenwood* (2); *Winter* v. *Henn* (3); *Ramsden* v. *Ramsden* (4); *Bromley* v. *Wallis.* (5) The petitioner, therefore, was entitled to a verdict for at least nominal damages, and there was no jurisdiction to order him to pay costs.

(1) 10 P. D. 174.

(2) Selw. N. P. 3rd ed. p. 9, n.

(3) 4 C. & P. 494.

(4) 2 Times L. R. 867.

(5) 4 Esp. 237.

As to the cases which make the other way, it must first be observed that ss. 30 and 31 do not apply to petitions claiming damages, for so far nothing but a petition for divorce has been mentioned, and no power to claim damages has been given. In *Seddon* v. *Seddon* (1) no reference was made to s. 33, and the Court, apparently without argument, assumed the case to fall within the discretionary power given by s. 31, and assumed also that this discretion was exercisable as between the petitioner and the co-respondent, which is not a proper construction of the Act.

[LINDLEY, L.J., referred to *Seddon* v. *Seddon* (2) as important with respect to the connection of the sections.]

In *Ravenscroft* v. *Ravenscroft* (3) the judge ordinary followed *Seddon* v. *Seddon* (1) without argument, and the question of damages was not before him. His attention was not called to s. 33, and his decision conflicts with *Pomero* v. *Pomero* (4) and with *Ramsden* v. *Ramsden.* (5) In *Story* v. *Story* (6) the petitioner was found to have been guilty of adultery; but there was a verdict for substantial damages against the co-respondent. The only question argued was whether the Court under the discretion given by s. 31 would dismiss the petition. The Court dismissed the petition, and held, without any argument, that the damages went with the petition, and that the petitioner could not recover them. *Pomero* v. *Pomero* (4) was not referred to, and it cannot be assumed that the judge intended to overrule it. Next as to the words in s. 33, that all the enactments of the Act as to the hearing and decision of a petition, so far as may be necessary, shall apply. The terms of the section shew that everything contained in it is controlled by the provision that the claims for damages shall be tried on the same principles as in the old action for damages, and where principles are thus laid down it is not "necessary" to resort to the procedure as to the hearing and decision of petitions. On the true construction of the section the latter part does not affect a petition claiming damages; but if it does, it only applies to so much of the petition as comes under s. 28, and does not claim damages. At common law, if a verdict was given for nominal damages, there was no jurisdiction to order the plaintiff to pay costs.

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(1) 2 Sw. & Tr. 640.
(2) 30 L. J. (P. & M.) 12.
(3) Law Rep. 2 P. & D. 376.
(4) 10 P. D. 174.
(5) 2 Times L. R. 867.
(6) 12 P. D. 196.

[LINDLEY, L.J. We are all agreed as to that.]

Sect. 51 gives the Court a discretion as to costs, and it is contended that under that the Court may make any party pay costs. But that section cannot apply here, because there is an express direction in sect. 33 as to the rules and regulations on which claims for damages are to be tried, and there were rules at common law governing costs.

Sir E. Clarke, and *Bargrave Deane,* for Turner. The discussion on the second point is academical; for supposing a verdict for nominal damages against Turner was entered, still under s. 51 the judge would have power to dispose of the costs as he has done. But to hold that there is a claim for damages at all when the petition for dissolution is dismissed would overrule several cases. The petitioner relies on *Pomero* v. *Pomero* (1); but it was not a considered or final decision, and the observations in it run counter to the current of authorities. The qualifying words in s. 33 refer us to ss. 30, 31, and 51. The petition is governed by s. 30 and must be dismissed, condonation having been proved.

[LOPES, L.J. Does not the Act mean that it must be dismissed so far as it prays dissolution? The more correct expression is that the respondent must be dismissed from the proceedings.]

The decision in *Seddon* v. *Seddon* (2) confirms the respondent's construction of ss. 31 and 33. The legislature intended to make the jurisdiction as to damages ancillary to the proceedings for divorce. It was necessary to provide for separate petitions as to damages, because the wife might have died. The case of *Ravenscroft* v. *Ravenscroft* (3) is important. The petitioner there claimed damages, adultery was proved, and the damages assessed. The Queen's Proctor then intervened and proved that the petitioner had been guilty of adultery. The petition was dismissed and the damages went with it. The damages given by the Act are not like the damages in an action of crim. con.: they are under the control of the Court, and the Court has power to settle them. If that decision was right the President was right in the present case. *Story* v. *Story* (1) is a case of authority, and is in point in this case. *Adams* v. *Adams* (2) is a similar authority.

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(1) 10 P. D. 174.

(2) 30 L. J. (P. & M.) 12.

(3) Law Rep. 2 P. & D. 376.

[*Kisch.* That was a case of connivance, which was a defence to an action of crim. con.]

Then as to what constitutes an effectual condonation, there is no decision supporting the view that condonation is conditional on a knowledge of all the previous guilt of the party forgiven. *Alexandre* v. *Alexandre* (3) proceeds on the contrary view. According to *Peacock* v. *Peacock* (4) condonation is the forgiveness of a conjugal offence with knowledge of the circumstances under which it was committed.

[LOPES, L.J., referred to *Keats* v. *Keats* (5) and *Seller* v. *Seller*. (6)]

Collins v. *Collins* (7), a Scotch case, contains observations which will be of assistance to the Court. The Divorce Act, s. 30, uses the expression "or has condoned the adultery complained of," not general terms referring to all conjugal offences of the party. The judge therefore was right in not directing the jury that there was no evidence of condonation.

Kisch, in reply. With regard to condonation. In *Turton* v. *Turton* (8) Dr. Lushington says: "In order to found a legal condonation there must be a complete knowledge of all the adulterous connexion and a condonation subsequent to it"; and this is interpreted in accordance with the petitioner's contention by Sir C. Cresswell in *Dempster* v. *Dempster*. (9) In *D'Aquilar* v. *D'Aquilar* (10) condonation is treated as conditional.

[LOPES, L.J., referred to *Rose* v. *Rose*. (11)]

Dempster v. *Dempster* (9) supports the petitioner's view, and so do *Durant* v. *Durant* (1) and *Bramwell* v. *Bramwell.* (2) See also Bishop on Divorce, vol. 2, 6th ed. c. 67, p. 59.

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(1) 12 P. D. 196.
(2) Law Rep. 1 P. & D. 333.
(3) Law Rep. 2 P. & D. 164.
(4) 1 Sw. & Tr. 183.
(5) 28 L. J. (P. & M.) 57.
(6) 28 L. J. (P. & M.) 99.
(7) 9 App. Cas. 205.
(8) 3 Hagg. 351.
(9) 2 Sw. & Tr. 438, 440.
(10) 1 Hagg. 773, 781.
(11) 8 P. D. 98.

As to the question whether damages fall with the claim for divorce, *Ramsden* v. *Ramsden* (3) proceeds on the view that they do not. In *Norris* v. *Norris* (4) there was no claim for damages and no jury. It has been contended that the Act contemplates a petition for damages after the death of the wife; but the Act directs the petition to be served on her. *Adams* v. *Adams* (5) does not bear upon the point, for it related to connivance, not to condonation. The argument that damages are merely ancillary to divorce is disposed of by the fact that the Act authorizes a petition for damages only. Sect. 33 must be closely examined. Sect. 27 authorizes a petition for divorce without saying anything about damages, and until s. 33 "the petition" means simply a petition for divorce. Sect. 30 enacts that if condonation is proved the petition shall be dismissed; but that refers to a petition for divorce only. Unless there is a claim for damages the petition is gone if condonation is proved; but where there is a claim for damages, unless it is allowed to continue against the co-respondent, there is an inconsistency with s. 33. There is no case against the petitioner in the sense in which *Pomero* v. *Pomero* (6) is in his favour—a case in which the point was distinctly raised and decided.

1893. Aug. 7. LOPES, L.J. Lindley, L.J., has requested me to give the first judgment.

The petitioner prayed for a divorce from his wife on the ground of her adultery with the two co-respondents (Turner and Sampson), claiming damages from Turner and costs against both co-respondents. Divers acts of adultery were alleged at divers times and divers places against both co-respondents. The respondent and co-respondent Turner denied the charges of adultery, and the co-respondent Turner set up condonation by the petitioner of the adultery complained of with him. Adultery both with Turner and Sampson was proved. At the trial it was proved that the petitioner had condoned the adultery with Turner; but it was also proved that at the time of such condonation he did not know of the adultery with Sampson. The President, after hearing the evidence, dismissed the petition against Turner, on the ground that the petitioner had condoned the adultery of his wife with him, and refused to entertain the claim for damages made by the petitioner against Turner, and ordered that the petitioner should pay Turner's costs. The President granted a decree nisi against Sampson. No question arises in the case so far as it relates to Sampson.

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(1) 1 Hagg. 733.
(2) 3 Hagg. 618.
(3) 2 Times L. R. 867.
(4) 4 Sw. & Tr. 237.
(5) Law Rep. 1 P. & D. 333.
(6) 10 P. D. 174.

The petitioner now appeals against the decision of the President, so far as it relates to Turner, on the following grounds, which Mr. Kisch has placed before the Court with great force and clearness. First, Mr. Kisch, on behalf of the appellant, contends that he is entitled to a new trial, because the President misdirected the jury in not telling them, first, that there was no evidence of legal condonation of the adultery with Turner, and because he should thereupon have granted a decree nisi; secondly, in not telling the jury that Turner was not entitled to rely upon condonation as an answer to the claim for damages; thirdly, in not telling the jury that they must assess damages against Turner, whose costs the petitioner could not legally be ordered to pay.

With regard to the first point, it was contended that there could be no legal condonation of the wife's adultery with Turner, however complete and absolute the forgiveness, and however full and complete the knowledge of all the circumstances of that particular offence, if at the time of such condonation there was any other matrimonial offence of the wife unknown to the husband—in fact, that condonation, to be legal and effective, involved the knowledge by the husband of all the adulteries of the wife with whomsoever committed up to the time of the condonation; that he could not forgive one act of adultery, or the adultery with one person, all the facts and circumstances of which he well knew, and, knowing, elected to forgive and resume cohabitation with his wife, unless he also knew all her matrimonial delinquencies then existing. This view of condonation is not supported by the Act of Parliament (20 & 21

Vict. c. 85), which now regulates all proceedings for divorce, whether it be à mensâ et thoro or à vinculo, nor, I think, by the authorities.

I will deal first with the Act of Parliament (the Matrimonial Causes Act). Sects. 27 and 28 provide the new remedy of dissolution of marriage. They create a power which the Ecclesiastical Courts did not possess, a power totally new in England, s. 28 enacting that the adulterer is to be made a co-respondent, and, of course, the adulterers, if more than one. Sect. 29 declares it to be the duty of the Court, upon a petition for dissolution of marriage, to satisfy itself, not only of the facts charged in the petition, but also, amongst other things, "whether or no the petitioner has condoned the adultery." I take that to mean the particular adultery relied upon—alleged to have been committed with the particular co-respondent charged with it. This is made more clear by s. 30, which deals with the dismissal of the petition, for it says the Court shall dismiss the petition if it finds that the petitioner "has during the marriage condoned the adultery complained of." Complained of where? Surely in the petition and with the particular co-respondent charged with it; not adulteries of which the petitioner then had no knowledge and could not complain. Again, s. 31, dealing with the power of the Court to pronounce a decree for dissolving the marriage, uses the words "has condoned the adultery complained of." I infer from the language of the Act that the legislature contemplated the case of adulteries known to the husband and complained of, and not other adulteries not known, and therefore not complained of: the former, known and capable of being condoned; the latter, not known and not capable of being condoned; and, with this state of things in their minds, advisedly provided for condonation in the one case and non-condonation in the other, never intending that no effective condonation should be possible unless all the matrimonial offences existing at the time were known to the forgiving party. As an abstract proposition it seems to me most unreasonable to say that you cannot forgive an offence, all the circumstances of which you know, unless at the time you are also acquainted with other delinquencies of the person forgiven. It would introduce into forgiveness such uncertainty—

such a power of retraction and revocation—as would to a great extent make forgiveness no forgiveness at all.

I now proceed to deal with the authorities. *Dempster* v. *Dempster* (1) was decided in 1861, and is an important case. It seems to me to make it clear that, up to that time, the question as to what amount of knowledge of conjugal offences is necessary to constitute legal condonation was an open question, upon which the learned judge who decided that case had not himself formed a concluded opinion. He deals with *Durant* v. *Durant* (2); *Turton* v. *Turton* (3), and *Bramwell* v. *Bramwell* (4); and (at p. 440) says, "If the dicta from *Turton* v. *Turton* (3) and *Bramwell* v. *Bramwell* (4) are to be taken literally, they dispose of the question; but if they are to be construed with reference to the facts of those cases, and with reference to *Durant* v. *Durant* (2), they seem to me to leave it an open question whether adultery by a husband with A. may not be condoned, although he had previously been guilty of adultery with B., which at the time of the alleged condonation was unknown to the wife." In 1870 the case of *Alexandre* v. *Alexandre* (5), the Queen's Proctor intervening, came before Lord Penzance. The petition contained two charges of adultery, and alleged that neither of them had been condoned. The Queen's Proctor intervened, and proved condonation of one adultery, but not of the other, and the Court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery. That case proceeds on the assumption that one matrimonial offence may be condoned, notwithstanding the fact that at the time of such condonation there may be another matrimonial offence unknown to the other party to the marriage. Lord Penzance says: "As regards the adultery which resulted in the birth of the child, I think the facts now disclosed are a complete answer to the petitioner's claim to a decree, because he condoned it. But there is another charge of adultery, which was established on the first hearing, and which is not only not refuted now, but is really supported by what the respondent

(1) 2 Sw. & Tr. 438.
(2) 1 Hagg. 733.
(3) 3 Hagg. 351.
(4) 3 Hagg. 629.
(5) Law Rep. 2 P. & D. 164.

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has told us." Then the learned judge proceeds: "Then substantially the charge of adultery at Buckingham Place is proved; and what answer is there to that adultery? It has never been condoned, because the husband never knew of it." The adultery in Buckingham Place was anterior to the condoned adultery, but was carefully concealed from the petitioner when he condoned the subsequent adultery. It is clear to my mind that Lord Penzance did not consider that to constitute legal condonation there must be knowledge of all the conjugal delinquencies. It is clear he took the contrary view. In 1858, *Peacock* v. *Peacock* (1) was decided. It was a petition for judicial separation. The respondent, amongst other defences, set up condonation. The judge ordinary (Sir C. Cresswell) explained to the jury that condonation signified forgiveness of a conjugal offence with full knowledge of all its particulars. It was not suggested that the forgiving party need know more than all the particulars of the particular offence forgiven. In 1859, *Keats* v. *Keats and Montezuma* (2) came before the Court. The respondent denied the adultery and pleaded condonation, and the judge ordinary, addressing the jury on condonation, said: "Condonation meant a blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed." A person may forgive in the sense of not meaning to bear illwill or not seeking to punish, still being far from meaning to restore the guilty party to his or her original position. A master may forgive a clerk or a servant who has robbed him. He may say, "I forgive you," without having the slightest intention to restore him to the position he has forfeited. I take it that condonation would mean something more than that. To use the language of Lord Stowell, it is like the releasing a debt; it makes it as if the debt had never existed. Again, with reference to condonation, it has been held that the person condoning must know of the offence, otherwise he cannot be supposed to condone it. The definition of condonation given by the judge ordinary was afterwards sought to be impeached before the full Court, but the attempt failed. It will be observed that the learned judge uses the words "blotting out of the offence imputed." Nothing is said of other offences not known at the time of the condonation, the existence of which might make the condonation inoperative. It appears to me that to hold condonation effectual only where the forgiving party knew of all the delinquencies of the party forgiven would lead to results which shew that such cannot be the true meaning of legal condonation. An injured husband prays dissolution of his marriage on account of his wife's adultery with A.; the wife admits the adultery and pleads condonation; the condonation is proved and petition dismissed. A year afterwards the same injured husband prays dissolution of his marriage on account of his wife's adultery with B. Adultery with B. is proved, such adultery being before the condoned adultery with A. What is to happen? The husband condoned the adultery with A., not knowing of the adultery with B.; the condonation cannot be recalled, for the petition has been dismissed, and no fresh proceeding can be taken against A. If the contention of the appellant here was maintained, the condonation of the adultery with A. would be inoperative, because there was existing at the time of the condonation adultery with B., of which the condoning husband knew nothing. But if the condonation of the adultery with A. is to be operative in the case I have put, it is simply operative, if the appellant's contention is supported, because there have been two petitions, instead of one, making A. and B. both co-respondents. I cannot accede to the appellant's contention as to his point on condonation. Condonation is a conclusion of fact, not of law, and, in my judgment, means the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The husband, in my opinion, need not be aware of all the acts of adultery committed by the wife when he forgives her any particular act of adultery. Condonation means a full and absolute forgiveness, with knowledge of all that is forgiven—it does not operate as a forgiveness of other unknown adulteries; but, on the other hand, there is no reason why it should not stand good although the husband has since been made aware of other adulteries committed by the wife, which were unknown

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(1) 1 Sw. & Tr. 183.

(2) 28 L. J. (P. & M.) 57.

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to him at the time of the condonation, and as to which every remedy remains. On this point I think the learned President rightly directed the jury, and properly dismissed the petition against Turner, so far as it related to the prayer for dissolution of the marriage.

But it is said, and strongly urged as a second point by the appellant, that, assuming that the learned President was right in holding that there was evidence of condonation, and that the jury rightly found condonation, still that, the adultery of the wife with Turner being proved, the petitioner was entitled to damages, notwithstanding the condonation, and that the President ought so to have directed the jury. It was contended that condonation is no bar to the recovery of damages where the adultery is proved and damages are claimed, but that the same principle is to be applied as in the old action of criminal conversation.

It is necessary to consider the law applicable to the old action of criminal conversation, and also the Act of Parliament, and especially s. 33 of that Act. It is true that s. 59 of the Act abolishes the old action of criminal conversation; but, inasmuch as the principles of law and rules of practice which governed it are to apply to a claim for damages substituted for it by s. 33, it is necessary to consider what the law and practice were upon the subject. The injured husband was entitled to recover compensation in damages for the loss of the society, comfort, and assistance of his wife in consequence of the adultery. The injured husband must have come into Court with clean hands. How far his misconduct was an answer to the action, or only went in mitigation of damages, was a question about which different opinions were entertained. The wife was no party to the action. If illicit intercourse was had with the wife and the husband was not privy to it at the time, but knew of it afterwards, and then received her back, the subsequent reconciliation went only in mitigation of damages: per De Grey, C.J., *Howard* v. *Burtonwood*. (1) This was agreed to by the Court in *Duberley* v. *Gunning* (2), and said by Buller, J., in that case to be settled law. Therefore, before the Act of Parliament most clearly condonation was only available by the adulterer in mitigation of damages, and was no answer to the action; and the injured husband, however much he had forgiven his wife, could bring his action against the adulterer and recover damages, the condonation only going in mitigation.

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(1) C. B., Trinity Sittings after Michaelmas Term, 16 Geo. 2. Selwyn N. P. 3rd ed. p. 9, n.

(2) 4 T. R. 651.

Now, how far has this state of the law been altered by the Act? Sect. 59 abolishes the old action of criminal conversation; and it is enacted by s. 33, as regards the claim for damages, that it shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation at the time of the Act coming into operation were tried and decided in Courts of Law. It was an inseparable incident of the old action that condonation was no answer to the action, and only went in mitigation of the damages. Is there anything in the Act to shew that this state of the law was no longer to exist? Sects. 27–31 deal with petitions for dissolution of marriage in cases where no damages are claimed, s. 30 enacting that in case the petitioner has condoned the adultery complained of then the Court shall dismiss the petition. That the Court is compelled so to proceed where no damages are claimed is clear. But what is to happen if damages are claimed? This depends on the construction of s. 33. That section permits the injured husband to claim damages against the adulterer in a petition for dissolution of marriage or judicial separation, or in a petition limited to damages only. Such petition is to be served on the alleged adulterer and the wife, and then follow these words: "and the claim made by every such petition shall be heard and tried on the same principles and in the same manner and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law, and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment." Did the legislature, when it said that the claim made by every such petition was to be heard and tried on the same principles as actions for criminal conversation, intend to make condonation, which had never before been a defence in actions of criminal conversation, an answer to the claim for damages? If there was nothing more in the section, I should say certainly not; but then follow these words: "and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment." This drives me back to s. 30, and there it is made imperative on this Court to dismiss the petition if satisfied that the petitioner has condoned the adultery complained of. Here is the crucial question: Does the claim for damages when condonation is proved fall with the petition, or does it survive? I have felt difficulty in giving an effect to condonation since the Act of Parliament which it never possessed before, having regard to the words of the 33rd section. The chief difficulty arises in the case of a petition limited to damages only, when the dissolution of the marriage is not prayed, and the adulterer sets up the condonation of the wife. If effect is given to s. 30, the Court is compelled to dismiss the petition. The strongest ground, in my judgment, for thinking that the claim for damages falls with the petition where condonation is proved is this: Under s. 30 the petition is to be dismissed in the following cases—(1.) If the Court is not satisfied that the alleged adultery has been committed; (2.) if the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage; (3.) if he has condoned the adultery complained of; (4.) if the petition is presented in collusion with either of the respondents. In the first two cases a good defence to the old action of criminal conversation would have existed at common law, yet condonation is put on the same footing as these cases. This leads me to think the legislature intended to remodel the law in respect of condonation, and to make condonation a ground for dismissing a petition claiming damages if condonation was proved, just as if the alleged adultery had not been proved, or it had been proved that the petitioner had connived at the adultery of the other party to the marriage. I read the words at the end of s. 30

thus: "Then and in any of the said cases the Court shall dismiss the said petition," whether it contains a clause for damages or not, including in the category condonation. I come, therefore, to the conclusion that, on the true construction of the Act of Parliament, the claim for damages is ancillary to and dependent on the petition and falls with it. It is to be observed, too, that the damages when recovered are to be placed under the control of the Court. The claim, too, for damages, if the petition is for damages only, must be made by petition, and it is therefore a petition within s. 30. It would be, too, somewhat inconsistent with the definition I have given of condonation, implying an absolute and complete forgiveness of the offence complained of, followed by cohabitation, to hold that the injured spouse was still entitled to be compensated in damages: it would be analogous to holding that a creditor could sue for a debt which he had released.

I will now deal with the authorities, which seem to me to favour the construction which I have placed upon the Act of Parliament. The two directly in point are *Pomero* v. *Pomero and Hadley* (1), decided in 1884, and *Story* v. *Story and O'Connor* (2) decided in 1887, taking different views of the matter in controversy; but of those cases presently; I will first deal with earlier cases. *Norris* v. *Norris, Lawson and Mason* (3), decided in 1861, was a petition for dissolution of marriage where condonation was set up. There was no claim for damages, and the decision was on s. 34 of the Act in respect of costs. The judge ordinary said the petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this Court. *Seddon* v. *Seddon and Boyle* (4) was before the Court in 1860. It was a petition for dissolution of marriage on the ground of the wife's adultery, claiming 3000*l.* damages against the co-respondent. The answer charged that the petitioner, by his wilful neglect and misconduct, had conduced to the adultery of the respondent, and counter-charged adultery. It was contended in argument that a co-respondent is precluded

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(1) 10 P. D. 174.

(2) 12 P. D. 196.

(3) 4 Sw. & Tr. 237.

(4) 30 L. J. (P. & M.) 12; 2 Sw. & Tr. 640; 31 L. J. (P. & M.) 31.

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by the terms of the 33rd section of the Act from pleading such matters in answer to a petition in which the husband claims damages. In the course of the argument (1) the judge ordinary asked the counsel this question, "Suppose a petition claims damages, and the adultery is clearly proved, but there is proof also of such misconduct on the part of the husband as would induce the Court to refuse a divorce, would the petitioner be entitled to his damages?" The learned counsel said, "Yes." Whereupon the judge ordinary said, "He certainly would not, if the Court is to treat the claim for damages as an action for crim. con., for, the petition being dismissed, he would be in the position of a non-suited plaintiff." This is strong to shew the view the judge ordinary took of s. 33. *Ramsden* v. *Ramsden and Luck* and *Ramsden* v. *Ramsden* (2), in 1886, were two suits which had been consolidated; the one was a suit to recover damages by the husband against Luck, not praying for a dissolution of the marriage; the other by the wife against the husband for dissolution of the marriage, on the ground of his adultery and cruelty. With regard to the adultery charged by the wife against the husband, he set up condonation. The adultery by Luck with the wife was admitted. The jury found that Ramsden, the husband, had committed adultery, that the adultery had been condoned by the wife, but that it had been revived by the cruelty of the husband subsequent to the condonation. They further found that Mrs. Ramsden and Luck had committed adultery, and they assessed damages against Luck and in favour of Ramsden at one farthing. The President dismissed Mrs. Ramsden's petition on account of her adultery, but gave her costs against her husband. In the suit of *Ramsden* v. *Luck* (2), he directed that each party should pay his own costs, and does not appear to have given judgment for one farthing.

I now come to the two cases of *Pomero* v. *Pomero and Hadley* (3), and *Story* v. *Story and O'Connor.* (4) These cases are directly in point. The first was a husband's petition for dissolution and for damages against the co-respondent. The petitioner admitted in his evidence that he had condoned his wife's adultery and taken her back to live with him. It was urged that condonation of adultery committed by a wife with a particular person was a bar to any proceedings in the Court by the husband against that person. Butt, J., thought s. 33 of the Act clear, and said a great hardship would be inflicted by depriving a husband who had pardoned his wife of all remedy against the adulterer. He cites s. 33, and then says condonation was no bar to the action for criminal conversation, and, therefore, although condonation is proved and admitted, the case must go to the jury on the issue of connivance, and, if necessary, to assess the damages. The case does not appear to have been very elaborately argued, and the only authority cited was *Norris* v. *Norris, Lawson and Mason.* (1) It was decided in 1884, and in 1887 the case of *Story* v. *Story* (2) was heard by Sir James Hannen. It was a suit by the husband for dissolution of his marriage with the respondent, on the gronnd of her adultery with the co-respondent, and claimed damages. The respondent in her answer pleaded condonation, and countercharged adultery, which the petitioner did not deny, but pleaded that the respondent had condoned the offence and lived with him afterwards. The jury found that the respondent and co-respondent had committed adultery, and that the petitioner had not connived at nor condoned the adultery. They assessed the damages at 300*l.* The petitioner admitted his own adultery with a maid-servant, which was condoned by the wife. The learned judge came to the conclusion that the petitioner, having shewn himself regardless of the marital tie, was not entitled to come to the Court and claim a release from the marriage bond, and dismissed the petition. Counsel for the petitioner inquired as to the damages. The President said: "They go with my decision on the petition. As the petition is dismissed the petitioner is not entitled to damages."

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(1) 30 L. J. (P. & M.) 13.
(2) 2 Times L. R. 867.
(3) 10 P. D. 174.
(4) 12 P. D. 196.

The case of *Pomero* v. *Pomero and Hadley* (3) was not cited. These two cases are directly in point, and are in direct conflict with each other. I have to decide which is to be followed.

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(1) 4 Sw. & Tr. 237.

(2) 12 P. D. 196.

(3) 10 P. D. 174.

Story v. *Story and O'Connor* (1) is decided in accordance with the construction which I place upon the Act of Parliament, and seems to me to be consonant with the authorities, and I am told is in harmony with the practice of the Court. I think the claim for damages falls with the petition. *Story* v. *Story* (1) ought, in my judgment, to be followed, and *Pomero* v. *Pomero and Hadley* (2) overruled.

With regard to s. 51, I have no doubt but that it confers upon the Court the power to deal with the costs, whether damages be claimed or not.

The result is that the judgment of the President must be affirmed, and the appeal dismissed with costs.

A. L. SMITH, L.J. This is an appeal from the judgment of Sir F. Jeune in a suit by a husband against his wife for divorce, wherein he charged her with having committed adultery with two co-respondents, Sampson and Turner, and he also claimed damages against Turner.

The learned judge dismissed the petition against Turner, or, to state it more accurately, dismissed him from the suit upon the ground that it was established that the petitioner had condoned his wife's adultery with him, and he also adjudged that the petitioner should pay Turner's costs.

As regards the case against the co-respondent Sampson, a decree nisi was granted, and no question arises on this appeal thereon.

Mr. Kisch, who argued the petitioner's case with great ability, asserted that this judgment was erroneous, first, because there was no evidence to constitute condonation by the petitioner of the adultery of his wife with Turner, and, inasmuch as Turner's adultery had been proved, he should not have been dismissed from the suit; and, secondly, upon the ground that as damages were claimed by the petitioner against Turner, who had been proved to have committed the adultery charged, the petitioner was entitled as of right to a verdict and judgment for at least nominal damages against him, and consequently the petitioner could not be ordered to pay his costs.

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(1) 12 P. D. 196.

(2) 10 P. D. 174.

The short facts which raise the first point are these. It was proved that the petitioner, with full knowledge of his wife's adultery with Turner, forgave it, and resumed cohabitation with her; but it was argued that inasmuch as when he did so he did not know of the adultery which had then taken place between his wife and the other co-respondent, Sampson, there could be no condonation of the adultery with Turner, for to constitute condonation the husband must forgive all adulteries of his wife, whether known or not at that time. This raised a point which was new to me; but, as it has been raised, it must be examined.

I first turn to the Divorce and Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85), which founded the present Divorce Court and its proceedings. Sect. 27 deals with the presentation of a petition for divorce by husband against wife or vice versâ, in which damages are not claimed. Sect. 28 enacts that, unless excused, the husband in such petition shall make the alleged adulterer co-respondent. That means the alleged adulterers are to be made co-respondents if there are more than one, and it appears to me that in such circumstances the case against each is separate and distinct. Sect. 29 enacts that the Court upon such petition is to satisfy itself, as far as it reasonably can, whether the petitioner has connived at or condoned the adultery —that means, the separate adulteries charged, if more than one, and also to inquire into counter-charges, if any; and s. 30 enacts amongst other things that if the petitioner has connived at or condoned the adultery complained of—that is, the separate and distinct adulteries complained of in the petition if more than one—the Court shall dismiss the petition.

But Mr. Kisch says that to constitute condonation the whole of the adulteries actually committed by the wife must be condoned, whether known or not, or complained of or not in the petition; that condonation is the forgiveness of the wife of all her adulteries, and not the forgiveness of the co-respondent; and that unless the husband knows of all the adulteries his wife has committed when he forgave a particular adultery and resumed cohabitation, it is not condonation at all; for in such circumstances he does not blot out all the offences of his wife, which alone constitutes condonation. He also says, that unless the husband

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is informed of all the adulteries of his wife when he forgives a particular adultery, he is led to do so under circumstances which cause the forgiveness of the particular adultery not to be a forgiveness at all. It seems to me that as to this the most which can be said is that he might not have forgiven the particular adultery if he had known of all; but I do not understand how it can be said that it is not any forgiveness at all.

Test the correctness of these propositions in this way: Petition by a husband against a wife charging adultery with co-respondent A. Defence by A. that this adultery has been condoned by the petitioner. Did any one ever hear of a reply by a petitioner by way of confession and avoidance to such a defence, "I admit that I have forgiven and condoned my wife's adultery with you; but when I did so, I did not know that my wife had also committed adultery with X., Y., and Z., and therefore I have not condoned the adultery with you"? Yet, if Mr. Kisch is correct, this would be a good reply. No such replication can be found in the books, although circumstances must on very many occasions have existed whereby to get rid of a defence of condonation if the proposition is sound.

The cases of *Durant* v. *Durant* (1), and of *Turton* v. *Turton* (2) and *Bramwell* v. *Bramwell* (3), wherein somewhat equivocal language was used, were cited to support the point insisted upon, and also the case of *Dempster* v. *Dempster* (4), where Sir Cresswell Cresswell pointed to the two constructions which could be placed upon the language so used, and where he left the point undecided.

In my judgment, the law as to condonation was accurately and clearly stated by Sir Cresswell Cresswell in *Keats* v. *Keats* (5), where he described it "as a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the offence was committed," and again in *Peacock* v. *Peacock* (6), where it is described as the forgiveness of a conjugal offence with the full knowledge of all the circumstances attending it.

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(1) 1 Hagg. 733.
(2) 3 Hagg. 351.
(3) 3 Hagg. 618.
(4) 3 Sw. & Tr. 438.
(5) 28 L. J. (P. & M.) 59.
(6) 1 Sw. & Tr. 183.

There is no authority that to constitute condonation there must be a forgiveness of all conjugal offences whether known or not, and indeed the case of *Alexandre* v. *Alexandre* (1) is opposed to this contention. In that case the wife had been guilty of adultery with two different persons, one of which acts the petitioner had condoned, and the other he had not, it not being then known to him. Yet the judge ordinary (Lord Penzance) held that the offence which was disclosed was condoned, although the other was not, and he granted a decree for divorce upon that adultery which the petitioner had not condoned. His view of the condonation of the known offence is inconsistent with the contention of the appellant on the point now taken. We are asked to say that Lord Penzance was wrong. I decline to do so, for I believe his view to be in consonance with the law as long since administered in this country as regards condonation, and in my judgment the first point raised is untenable.

Now, as to the second point, viz., that, where damages are claimed and adultery proved against a co-respondent, the petitioner is entitled as of right to a verdict and judgment for damages against that co-respondent in precisely the same way as if the suit were an old action for criminal conversation, and that as condonation was no defence to such an action, so now in a petition by a husband, if he claims damages against the co-respondent under s. 33, and the sole defence is condonation, the petitioner is entitled to a verdict and judgment in his favour for damages as of right.

The first remark I wish to make upon this is: If this be so, why did the legislature expressly abolish the old action of criminal conversation as it did by s. 59, and frame in its place the somewhat elaborate section, viz., s. 33, which beyond question interfered with the petitioner obtaining the damages for himself, as in the action for criminal conversation he would have done? Secondly, if this argument be correct (and I now assume only one co-respondent with whom the wife has committed adultery so as to get clear of the first point), this strange result would follow, that whereas by s. 30 it is unquestionably enacted that if "the adultery complained of" has been connived at or condoned, or if the petition has been presented in collusion, the Court shall dismiss the petition, yet if the adultery has been condoned and the petitioner goes for and obtains damages against the co-respondent the Court shall not dismiss the petition. I cannot find any indication of this in the statute, which enacts without qualification that if the adultery complained of be connived at or condoned the Court shall dismiss the petition. It should be noticed that connivance was a defence to an action of criminal conversation, whereas condonation was not; yet by the Act the same consequences are now to follow from each, viz., that the petition shall be dismissed. Sect. 33 now empowers a husband to make a claim for damages against a co-respondent either in a petition for dissolution of marriage or in a petition for judicial separation, or in a petition for damages only, and enacts that such claim for damages shall be "heard and tried" upon the same principles, in the same manner, and subject to the same rules and regulations as actions of criminal conversation formerly were—that is, by a jury, by examination and cross-examination of witnesses in open Court, by admission of the same evidence, by a direction as to how damages were to be assessed, and with like speeches of counsel; but in addition thereto (and this is what also now differentiates a petition asking for damages from the old action of criminal conversation), that all the enactments of the Act as to the hearing and "decision" of the petition, so far as may be necessary, shall apply.

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(1) Law Rep. 2 P. & D. 164.

Amongst the enactments which it is necessary to apply when the Court has to decide as to what is to be done with a petition proved after hearing and trial to be founded upon condoned adultery is s. 30, for that section enacts that such a petition shall be dismissed. In my judgment, it is not correct to state that a petitioner is now in the same position as in the old criminal conversation action days, for to get damages from an adulterer he is now compelled by statute to proceed by way of petition in the Divorce Court, he cannot as of right get the damages for himself, and the statute is express that for condoned as well as for connived adulteries the petition shall be dismissed. It will be seen that even where a petition is brought only to recover damages against an adulterer under s. 33, the

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petition is to be served upon the wife, unless such service is dispensed with by the Court. This was not so in an action of criminal conversation. In my opinion, when a petition under s. 33 is dismissed, away goes the claim for damages together with all other claims therein; for when the petition is dismissed there is nothing whereon to hang a judgment for damages, as argued by the petitioner. In my judgment the true construction of the statute is, that a petitioner cannot recover damages from an adulterer when he has either connived at or condoned the adultery for which he asks for damages, nor when he has presented his petition in collusion. The legislature has now placed all matrimonial cases, whether damages are sought for therein or not, under the jurisdiction of the Court, to be dealt with as the statute prescribes.

So much for the statute. I now come to the cases.

In the year 1861, in *Norris* v. *Norris, Lawson and Mason* (1), the husband petitioned for a divorce upon the ground of his wife's adultery with the co-respondents. As to one co-respondent the adultery had been condoned. The judge ordinary, as regards the condoned adultery, held, "that the petitioner by condoning his wife's adultery had waived all right to any proceedings against the co-respondent in the Court." The learned judge acted upon the provisions of s. 30, though it is true that in this case the petitioner did not ask for damages. In *Seddon* v. *Seddon and Doyle* (1862) (2), the husband petitioned under s. 33 for a divorce from his wife, claiming damages against the co-respondent. The jury found that the wife had committed adultery with the co-respondent, and that the petitioner had been guilty of conduct conducing to that adultery, and they assessed the damages at a farthing. The judge ordinary, acting pursuant to s. 31, dismissed the petition. In a report of a proceeding in this case (3) the judge ordinary stated: "It is reasonable that a co-respondent should have an opportunity of protecting himself by appealing to the discretion of the Court, and asking the Court under the power conferred upon it by s. 31 under certain circumstances to dismiss the

(1) 4 Sw. & Tr. 237.

(2) 2 Sw. & Tr. 640.

(3) 30 L. J. (P. & M.) 14.

petition. . . . If he can plead such matters in answer to a petition which does not claim damages, it would be a strange thing if a petitioner by making such a claim could preclude a co-respondent from raising a defence he might otherwise have made by appealing to the discretion of the Court. . . . The meaning of the 33rd section is that the question of damages is to be dealt with upon the same principle, and in the same manner as in the Common Law Courts, not that the record is to be framed in the same manner." In the next year, 1867, in *Adams* v. *Adams* (1), there was a petition by a husband against his wife for a divorce, claiming damages against a co-respondent; the jury found that the petitioner had connived at and had also condoned his wife's adultery, and found damages one farthing. The judge ordinary dismissed the petition, applying to s. 33 the provisions of s. 30. In 1872 Lord Penzance decided *Ravenscroft* v. *Ravenscroft and Smith.* (2) In this case the petitioner recovered a verdict for 100*l.* damages against the co-respondent; yet, upon the Queen's Proctor intervening and proving that the petitioner had been guilty of adultery, Lord Penzance, applying the provisions of s. 31, dismissed the petition. In 1886, *Ramsden* v. *Ramsden and Luck* (3) was decided. This was the very rare case of a petition by husband against co-respondent, claiming damages only. The adultery of the co-respondent was proved, and so was a countercharge of adultery by the petitioner. The jury assessed the damages at one farthing. The President, Sir James Hannen, directed that each party should pay their own costs; and if the argument now addressed to us be correct he should have given judgment for the petitioner for one farthing, which apparently from the report he did not. In *Story* v. *Story and O'Connor* (4), in 1887, a petitioner established that his wife had committed adultery with the co-respondent, and the jury assessed the damages at 300*l.*; but they also found that the petitioner had committed adultery, which had been condoned by the wife. The President dismissed the petition, and held that the petitioner was not entitled to damages.

It will be seen that in all these cases excepting the first the petitioner sought and recovered damages at the hands of the jury against the co-respondents, yet in each case the Court, when deciding as to what was to be done with the petition, applied the enactments of ss. 30 or 31, and refused to allow the petitioners to reap the benefits of their verdicts, and not a single case has been produced in which a petitioner to whom the provisions of either ss. 30 or 31 applied has recovered by judgment the damages assessed.

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(1) Law Rep. 1 P. & D. 333.
(2) Law Rep. 2 P. & D. 376.
(3) 2 Times L. R. 867.
(4) 12 P. D. 196.

It was, however, pointed out that Butt, J., in the year 1884, in *Pomero* v. *Pomero and Hadley* (1), had decided that condonation of the wife's adultery by a petitioner was no answer to his claim for damages against the co-respondent, and it certainly appears to me that such was the opinion of that learned judge when he decided that case. He held that under s. 33 the claim for damages was to be "heard and tried" on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions of criminal conversation were at the time of the passing of the Act; but his attention does not seem to have been directed to the further provisions of the section, viz., that when hearing and deciding a petition under s. 33 all the enactments of the statute so far as might be necessary should apply. That means, when deciding a petition under s. 33, in which the adultery has been condoned by the petitioner, the provisions of s. 30 shall apply, and when deciding a petition in which the petitioner has been guilty of any of the acts mentioned in s. 31 the provisions of that section shall apply.

I can find neither in the statute nor in the cases any indication that when deciding upon a petition in which damages are sought and condonation only is set up s. 30 shall not apply. The words are general and imperative, viz., that if the petition is founded upon condoned adultery it shall be dismissed. I am of opinion that the decision of Butt, J., cannot be supported, and that, when a petition under s. 33 is adjudicated upon, the provisions of either s. 30 or s. 31 apply as the case may be, and that the petitioner is not entitled as of right to a judgment for the damages awarded by the jury, and that Sir F. Jeune was correct when he dismissed Turner from the suit. That Sir F.

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(1) 10 P. D. 174.

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Jeune had jurisdiction to make the order he did as to costs, assuming that the petitioner was not entitled to a judgment for damages as of right, is apparent upon reading s. 51, and that there were good grounds in this case for the exercise of his discretion cannot be doubted.

For these reasons this appeal fails, and must be dismissed with costs.

LINDLEY, L.J. I have read the judgments of my brother Lords Justices, and I concur in them. I, however, wish to add some additional observations of my own. A careful study of the various sections of the Divorce Act which bear upon the present appeal has convinced me that, when in 1857 the legislature dealt with the whole subject of divorce and adultery, Parliament not only abolished the old action of crim. con. (s. 59), but remodelled the law applicable to claims for damages for adultery. My reasons are as follows:—

(1.) Such claims are placed wholly under the jurisdiction of the Divorce Court; they can only be made by petition, and the damages recovered are placed under the control of the Court (s. 33).

(2.) The petition must be served on the wife, unless the Court dispenses with such service (s. 33).

(3.) The petition must be dismissed if the petitioner has been accessory to or conniving at the adultery complained of, or has condoned the same (ss. 29, 30, 33).

(4.) The claim for damages is, in my opinion, subject to all these overriding provisions. But, subject to them, the claim is to be "heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations" as the old common law actions for crim. con.

The result is that, if a wife's adultery with a particular man has been condoned, no claim for damages against him is now maintainable. Under the present law such a conclusion is, in my opinion, highly reasonable, for to condone a particular act of adultery, and afterwards to make it the subject of a petition to which the wife is a party, to publish her condoned misconduct and to expose her to shame and misery, is to pursue a course of conduct so utterly inconsistent with condonation that I cannot bring myself to believe that the legislature intended to allow it.

The view thus arrived at is, no doubt, inconsistent with *Pomero* v. *Pomero* (1); but it is impossible, I think, to reconcile that case with a long line of authorities on the construction of the Act. The general view which I take of the Act is supported by *Seddon* v. *Seddon* (2); *Lyne* v. *Lyne* (3); *Norris* v. *Norris* (4), and *Story* v. *Story* (5), which is diametrically opposed to *Pomero* v. *Pomero.* (1) The latter case was at one stage of the present case followed by Sir F. Jeune (6); but he did not adhere to it when it became necessary to pronounce his final decision, and, in my opinion, he was right. *Pomero* v. *Pomero* (1) cannot, in my opinion, be supported, and ought to be distinctly overruled.

With respect to the question whether a husband can effectually condone his wife's adultery with one man even although he is ignorant of her adultery with another, I have come to the conclusion that he can. I have carefully considered the older authorities and the case of *Dempster* v. *Dempster* (7); but, having regard to the language of s. 30 of the Divorce Act, viz., "has condoned the adultery complained of," and having regard to the absurd consequences which would result from the opposite view, now that condonation is an answer to a claim for damages, I cannot judicially hold that a man cannot condone his wife's adultery with one man although he may be ignorant of her offence with another. This was evidently the view taken by Lord Penzance in *Alexandre* v. *Alexandre.* (8) It has been already decided that a subsequent offence by a wife will not enable her husband to obtain damages in respect of a previously condoned offence: *Norris* v. *Norris* (4), and that the condonation of one offence is no condonation of another which is unknown to the condoning party: *Alexandre* v. *Alexandre.* (8) The costs of all petitions, whether they claim damages or not, are in the

(1) 10 P. D. 174.
(2) 30 L. J. (P. & M.) 12.
(3) Law Rep. 1 P. & D. 508.
(4) 4 Sw. & Tr. 237; 30 L. J. (P. & M.) 111.
(5) 12 P. D. 196.
(6) [1892] P. 375.
(7) 2 Sw. & Tr. 438.
(8) Law Rep. 2 P. & D. 164.

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discretion of the Court (see s. 51), and there is no appeal on that subject (see s. 51).

In my opinion, this appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors: *Beyfus & Beyfus; Emanuel & Simmonds.*

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June 12;
July 3.

THE PETREL.

Admiralty—Collision—Limitation of Liability—Owners the same of both Ships—Common Employment—Gross Tonnage—Crew Space—Merchant Shipping Act, 1867 (30 & 31 *Vict. c.* 124), s. 9.

A collision occurred in the River Thames between two steamships, the *Petrel* and the *Cormorant*, belonging to the same owners, and the *Cormorant* sank, but there was no loss of life.

In an action brought by some of the owners of cargo on board the *Cormorant* against the *Petrel*, the latter vessel was found alone to blame. Thereupon the owners of the *Petrel* instituted proceedings for limiting their liability to 5658*l.* 5*s.* on 707·28 tons, being 8*l.* per ton on the gross tonnage of the *Petrel* without deduction of engine-room, but deducting 31·80 tons crew space under s. 9 of the Merchant Shipping Act, 1867, and, in respect of their claim for lost effects, making the master, officers, and crew of the *Cormorant* defendants with cargo owners and others.

On objection to the claim of the master, officers, and crew of the *Cormorant*, and to the deduction from the tonnage of the *Petrel* of the crew space:—

Held, first, that the master, officers, and crew of the *Cormorant* were entitled to claim against the fund in respect of their lost effects, for, though they had a common employer with the master, officers, and crew of the *Petrel*, in the sense that both crews were making money for him, they were not in common employment in the sense that injury from the negligence of one crew was an ordinary risk of the service of the other, for the safety of the crew of one of these two vessels did not depend on the skill and care of the crew of the other, more than on the skill and care of the crews of other vessels navigating the Thames.

Secondly, that, as the requirements of s. 9 of the Merchant Shipping Act, 1867, had been complied with, the plaintiffs, as owners of the *Petrel*—in calculating the tonnage upon which their statutory liability was based—were entitled to deduct the 31·80 tons crew space.

ACTION for limitation of liability on behalf of the owners of the British registered screw steamship *Petrel.*

The facts—so far as material on the questions: how far the masters, officers, and crews of two ships belonging to the same owners are in common employment, and whether, in a limitation suit, crew space can be deducted from gross tonnage—were shortly as follows:—

On January 5, 1893, a collision occurred, during a fog, in Sea Reach of the River Thames, between the screw steamship *Petrel*, which was proceeding up the reach on a voyage from Harlingen to London, and the screw steamship *Cormorant*, which had brought up on account of the fog, and was lying at anchor.

The result of the collision was that the *Petrel* was damaged, and the *Cormorant* sank, but there was no loss of life.

Both vessels belonged to the General Steam Navigation Company, and on January 31 an action was commenced by the owners of part of the cargo of the *Cormorant* against the General Steam Navigation Company, as owners of the *Cormorant*, for non-delivery of the cargo which had been lost, and in the alternative, against the same company, as the owners of the *Petrel*, for damage by collision. On March 24, the Court pronounced the *Petrel* alone to blame for the collision.

On April 5 the General Steam Navigation Company, as the owners of the *Petrel*, commenced the present action against themselves, as the owners of the *Cormorant*, and against the owners of her cargo and freight, and against her master, officers, and crew, praying that the above-named defendants and all others interested in the *Cormorant*, or her cargo, or the effects or other things on board her, might be restrained from prosecuting any action against the *Petrel* or the plaintiffs, on payment by the plaintiffs into Court of the sum of 5658*l.* 5*s.*, together with interest at the rate of 4 per cent. per annum from the date of the collision until payment, being 8*l.* per ton on 707·28 tons, the gross tonnage of the *Petrel* without deduction on account of engine-room space.

The owners of part of the cargo lately laden on board the *Cormorant* by their defence alleged that:

Par. 2. "The plaintiffs described in the writ and statement of claim as the owners of the steamship *Petrel* are the General Steam Navigation Company, being the same company as are made defendants to the said writ and statement of claim. The plaintiffs were at the time of the said collision the owners of the steamship *Cormorant* and her freight, and the master, officers, and crew of the steamship *Cormorant* were at the said time the servants of the plaintiffs and in the same employment as the master and crew of the steamship *Petrel*, by whose negligence the said collision was caused."

Par. 3. "These defendants will contend that neither the General Steam Navigation Company, as owners of the *Cormorant* and her freight, nor the master or officers and crew of the *Cormorant*, have any claim against the fund proposed to be paid into Court by the plaintiffs."

Par. 4. "The gross tonnage of the steamship *Petrel* is 739·08 tons, and the amount which the plaintiffs offer to pay into Court is not sufficient to satisfy the plaintiffs' liability. . . ."

The copy of the register, as verified by affidavit, shewed the gross tonnage of the *Petrel* to be 739·08 tons, and the plaintiffs arrived at the figure 707·28 tons by deducting 31·80 tons crew space.

It was admitted at the hearing that the claim of the General Steam Navigation Company, as owners of the *Cormorant*, against the fund paid into court by them as owners of the *Petrel*, could not be supported; but the plaintiffs contended that the master, officers, and crew of the *Cormorant* were entitled to claim, in respect of their lost effects, against the fund, although they had a common employer with the master, officers, and crew of the *Petrel*, and, with respect to the deduction of 31·80 tons crew space, reliance was placed on the practice under s. 9 of the Merchant Shipping Act, 1867 (30 & 31 Vict. c. 124), by which a deduction is authorized from "registered" tonnage of "every place in any ship occupied by seamen or apprentices and appropriated to their use," provided certain conditions are fulfilled, which it was not disputed had been complied with.

June 12. *Butler Aspinall*, for the plaintiffs, the owners of the *Petrel*.

T. E. Scrutton, for the defendants, owners of part of the cargo of the *Cormorant*.

H. Stokes, for other cargo owners.

The arguments of counsel sufficiently appear from the judgment.

In addition to the cases mentioned therein, the following were referred to:—On the question of the plaintiffs, as owners of the *Cormorant*, claiming against the fund to be paid into court by them as owners of the *Petrel*: *Simpson* v. *Thomson*. (1) On the question of the right to deduct crew space: *Burrell* v. *Simpson* (2); *The John McIntyre* (3); *The Zanzibar*. (4)

Cur. adv. vult.

July 3. THE PRESIDENT (SIR FRANCIS H. JEUNE). In this case two questions of a wholly different nature arise.

On January 5, 1893, the *Petrel* came into collision with the *Cormorant*, and the *Cormorant* was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the *Petrel*, and it is proposed to pay into court the sum for which the owners of the *Petrel* are liable. The first question is, whether the master, officers, and crew of the *Cormorant* can claim against this fund in respect of their effects lost in that vessel. It is said that they cannot, by reason of their common employment with the master, officers, and crew of the *Petrel*.

No doubt the captain and crew of the *Cormorant* had a common master with the captain and crew of the *Petrel*; but were they in common employment with each other?

It is remarkable that although propositions of law defining common employment and recognising its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English Courts (there are several in the Scotch Courts) in which upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, *Priestley* v. *Fowler* (5), in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of Shaw, C.J., of Massachusetts, in *Farwell*

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(1) 3 App. Cas. 279.

(2) 4 Sc. Sess. Cas. 4th Series, 177.

(3) 6 P. D. 200.

(4) [1892] P. 233.

(5) 3 M. & W. 1.

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v. *Boston Railroad Corporation* (1), which, no doubt, materially influenced the House of Lords in the case of *Bartonshill Coal Co.* v. *Reid* (2), in which, reversing the decision of the Court of Session, their Lordships held that a miner labouring in a mine was in common employment with the engine-driver by whom the cage was worked. Two phrases of Shaw, C.J., indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services," and the other refers to the condition of the safety of each servant depending much on the care and skill with which each other shall perform his appropriate duty. This view was adopted by Blackburn, J., in a judgment affirmed by the Exchequer Chamber (*Morgan* v. *Vale of Neath Ry. Co.* (3)), in these words: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages." On this principle, it having been previously decided in *Hutchinson* v. *York, &c., Ry. Co.* (4), that the engine-driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turntable was in common employment with shunters working traffic in connection with it. The view of Shaw, C.J., appears again to have been followed in *Lovell* v. *Howell* (5), in which the principle approved was that the servant accepts the ordinary risk incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant, and of "risk of injury being a natural and necessary consequence" of his want of skill or care, is consistent with, though perhaps more exact than, the test suggested by Lord Chelmsford in the case of the *Bartonshill Coal Co.* v. *McGuire* (1) from the negative point of view, that common employment does not exist when injury happens to the servant "on occasions foreign to his employment," or to servants engaged "in different departments of duty."

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(1) 4 Metcalf, 49, quoted at length in 3 Macq. H. L. C. 316.

(2) 3 Macq. H. L. C. 266.

(3) 5 B. & S. 570, at p. 580; Law Rep. 1 Q. B. 149.

(4) 5 Ex. 343.

(5) 1 C. P. D. 161.

It was suggested in argument before me with reference to the case of *Charles* v. *Taylor* (2), that the physical contiguity of the employments constitute a test. But, as Shaw, C.J., points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured, and in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of a rifle-range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskilfully packs dynamite in a factory, and another who in unpacking it at a distant warehouse is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment.

I doubt, also, if "one common object"—the phrase emphasized by Bramwell, B., in *Waller* v. *South Eastern Ry. Co.* (3)—supplies an exact criterion. As Blackburn, J., points out, there may be common employment, though the immediate object of the labour of the two servants be very different, and if the common object be remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and a brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of Blackburn, J. The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.

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(1) 3 Macq. H. L. C. 300, at p. 307.

(2) 3 C. P. D. 492.

(3) 2 H. & C. 102, at p. 112.

Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment.

The second question relates to the amount of the tonnage, by reference to which the measure of liability of the *Petrel* is to be fixed, and to the right to deduct from the gross tonnage for this purpose 31·80 tons, representing the berthing accommodation of the crew.

This question turns on the effect to be given to the 9th section of the Merchant Shipping Act, 1867. It is clear that the measure of liability is, under s. 54 of the Merchant Shipping Act Amendment Act, 1862, fixed as regards steamers by reference to the gross tonnage as determined by the 20th, 21st, and 22nd sections of the Merchant Shipping Act, 1854, that by virtue of s. 21, sub-s. 4, of that Act in calculating gross tonnage no account, subject to a condition mentioned, is to be taken of closed-in space solely appropriated to the berthing of the crew on the upper deck; and that the words embodying this last provision are repealed by s. 1, sub-s. 2, of the Merchant Shipping (Tonnage) Act, 1889, subject to the provisoes in that section contained. It is therefore argued that, as the provision by which berthing space on the upper deck was excluded from the sum of gross tonnage is repealed, such berthing space is to be included in the gross tonnage; but the reply is, that the 9th section of the Merchant Shipping Act, 1867, gives the right to deduct from the register tonnage places appropriated for seamen if certain conditions are complied with—which I understand to have been complied with in this case. The only difficulty in the way of this reply is, that the section speaks of register tonnage and not of gross tonnage. But I do not think that this difficulty is insuperable. "Register tonnage" in sub-s. 4 of s. 9 of the Act of 1867 is clearly the same thing as "registered tonnage" in sub-s. 3, and I think that those words refer to the total gross tonnage as registered, and not to the register tonnage mentioned in s. 23 of the Act of 1854 as distinguished from the gross tonnage calculated under s. 22 of that Act.

If this be not the effect of s. 9, the result would be that it would apply to sailing vessels, but not to steamers, with the consequence that sailing vessels and steamers, which, as regards the inclusion of berthing accommodation in their tonnage for the purpose of limiting liability, stood on the same footing under the Act of 1854, would be placed in a different position. There is no apparent reason for this, and it cannot be supposed to have been intended.

The intention of the Acts of 1867 and 1889, in this respect, seem to be clear. By the Act of 1854 berthing space below the upper deck was not exempted; berthing space above the upper deck, subject to a condition, was exempted. The Act of 1867 gave an exemption to all berthing space if certain sanitary conditions were complied with. As became clear from the case of *The Palermo* (1), berthing space above the upper deck retained

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(1) 10 P. D. 21.

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its exemption under the Act of 1854, though the sanitary conditions of the Act of 1867 were disregarded. By repealing the favour shewn to berth space above the upper deck by the Act of 1854, the Act of 1889 placed all berthing space in the same position, if the requirements of the Act of 1867 were complied with. Except for such a reason, it is difficult to see why the words in the Act of 1854 should have been repealed.

There is no decision that the 9th section of the Act of 1867 has the effect which I have ascribed to it; but the uniform course of practice has certainly been in harmony with such a view, and there are two cases which appear to assume the correctness of such a construction. In *The Franconia* (1), decided in 1878, it was discussed whether the berthing space below the upper deck in a foreign vessel could for the purpose of limiting her liability be excluded under s. 9 of the Act of 1867. If the contention in the present case be sound, that question could not have arisen. But no such contention was then put forward, and the Court decided that the foreign steamer could not claim the exception, not because the Act of 1867 never gave it, but because it gave it only when its requirements were observed. Again, in the case of *The Umbilo* (2), before Sir James Hannen in 1890, it was not disputed that the plaintiffs were entitled, in computing the gross tonnage of their vessel, to deduct the space solely appropriated for the berthing of the crew; in other words, it was admitted that the 9th section of the Act of 1867 had not the effect now attributed to it.

I think, therefore, that the plaintiffs are entitled to deduct the 31·80 tons in question.

Solicitor for plaintiffs: *William Batham.*
Solicitors for defendants: *Thomas Cooper & Co.*

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(1) 3 P. D. 164.

(2) [1891] P. 118.

T. L. M.

THE SOUTHGATE.

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Aug. 4, 8.

Admiralty—Carriage of Goods—Bill of Lading—Charterparty—Damage to Cargo—Negligence Clause—"Accident of Navigation."

By charterparty and bill of lading the defendants were exempted from liability for damage to the plaintiff's cargo arising from ". . . perils, dangers and accidents of the sea or other waters of what nature and kind soever; . . . strandings . . . and all other accidents of navigation, and all losses and damages caused thereby . . . even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by . . . improper opening of valves, sluices, and ports, or by causes other than those above excepted. . . ."

Whilst the defendants' steamship was lying at her moorings, loading the plaintiffs' cargo of grain, under the above charterparty and bill of lading, the circulating-pump delivery-valve in the side of the ship was reasonably and properly opened by the defendants' engineer, but was negligently and improperly left open, whereby a quantity of sea water entered the ship and damaged the plaintiffs' cargo. To prevent the vessel foundering at her moorings, where the water was deep, the master had her towed into shallower water, where she settled on the ground, and the water was subsequently pumped out.

For the loss so sustained the plaintiffs sued the defendants:—

Held, that the defendants were not liable as the negligence clause applied to "dangers and accidents of the sea or other waters," as well as to "accidents of navigation," and the words "unless stranded, sunk or burnt" constituted a condition preventing liability attaching to the shipowner for the damage occasioned by the valve being improperly open.

Semble, that the defendants were also protected because the damage resulting from the incursion of water into the ship—caused by the use of the valve, whilst she had cargo in her, though she was still at her moorings and not in motion—was an "accident of navigation" within the meaning of the exception in the first part of the clause in question.

Hearing, on point of law, arising in an action for non-delivery of goods, as to the construction of the clause in the charterparty and bill of lading excepting the negligence of the servants of the shipowner.

The plaintiffs were Trabotti & Co. of Odessa, the defendants were Turnbull, Scott & Co., owners of the steamship *Southgate*, and by charterparty, made in London, December 21, 1892, it was agreed between the plaintiffs, as freighters, and the defendants, as owners of the *Southgate*, that that vessel—of 1727 tons gross, and 1107 tons net register, described as discharging at Messina, and as being tight, staunch, and strong, and every way fitted for the voyage—should proceed to Sevastopol, and there load, always afloat, a full and complete cargo of grain, to be delivered at a port in the United Kingdom or Continent, within named limits, on payment of the agreed freight. Then followed the usual provisions of the 1890 Black Sea steamer charterparty, including the following (clause 14): "The act of God, Perils, Dangers and Accidents of the Sea or other Waters of what nature and kind soever; Fire from any cause on Land or on Water, Barratry of the Master and Crew, Enemies, Pirates and Robbers, Arrests and Restraints of Princes, Rulers, and People, Explosions, Bursting of Boilers, Breakage of Shafts, or any latent defect in Hull $\frac{\text{and}}{\text{or}}$ Machinery, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby are excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other Servants of the shipowners, but unless stranded, sunk or burnt nothing herein contained shall exempt the shipowner from liability to pay for Damage to Cargo occasioned by bad Stowage, by improper or insufficient Dunnage, or absence of customary Ventilation, or by improper opening of Valves, Sluices and Ports, or by causes other than those above excepted, and all the above exceptions are conditional on the Vessel being Seaworthy when she sails on the Voyage, but any Latent Defects in the Hull $\frac{\text{and}}{\text{or}}$ Machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the Owners, or any of them, or by the Ship's Husband or Manager."

The bill of lading, which incorporated "all conditions and exceptions of the charterparty," was in the form of the Mediterranean, Black Sea, and Baltic grain cargo steamer bill of lading, 1890, and contained similar exceptions to those above set out in the 14th clause of the charterparty.

According to an "admission of facts" agreed upon for the purposes of argument, "The *Southgate* commenced to load on the morning of Saturday December 19/31, 1892, and had loaded by

4 P.M. the following day (Sunday), when the work ceased, a large quantity (about 115,000 poods) of barley being a portion of the cargo intended for her. At 5.30 P.M. on the same day, while the vessel was still lying at her moorings, and before she was completely loaded, it was discovered that water had come into the ship, and on making examination, it was found that the engine hearth was already under water. Not being able to get the steam-pumps on board to work to pump the water out, and to prevent the vessel foundering at her moorings, where the water was deep, the captain engaged tugs, and towed the vessel to the south towards the shallow water of the bay, where she settled on the ground fore and aft. The water was subsequently pumped out of the holds. The delivery-valve door of the circulating-pump had been opened reasonably for an ordinary and proper purpose whilst the loading was going on by the engineers on board the vessel, but was improperly left open when work ceased on Saturday night, and remained off during the Sunday.

"By means of the said valve being left open a great quantity of water entered the vessel through the said valve, and found its way into the engine-room through the condenser. The failure to close the said valve was an act of negligence."

The material portion of the plaintiffs' case was contained in paragraph 2 of the statement of claim, by which they said that they "duly delivered to the defendants at Sevastopol and the defendants there shipped on board the said vessel pursuant to the said charterparty, about 115,000 poods of barley part of the said cargo the property of the plaintiffs. But the defendants although not prevented by any of the perils or matters in the said charterparty excepted did not safely carry and deliver the same as agreed and . . . after the said cargo had been loaded the said vessel was found to be making water rapidly and the said cargo had in consequence to be landed in a greatly damaged and deteriorated condition and the plaintiffs incurred loss and expense."

The material portion of the defence was contained in the following paragraphs, by which the defendants said that:—

Paragraph 11: ". . . by the terms of the said charterparty the defendants are exempted from liability for dangers and accidents of the seas or other waters and of navigation generally and all losses and damages caused thereby even when occasioned by negligence default or error in judgment of the master mariners or other servants of the shipowners and unless stranded sunk or burnt nothing therein contained shall exempt the defendants from liability to pay for damage occasioned by bad stowage or by improper opening of valves sluices and ports or by causes other than those above excepted. . . ."

Paragraph 12: "The said steamship sank or was stranded in the harbour of Sevastopol after the said cargo had been shipped and before the said steamship had in fact proceeded out of the harbour on her said voyage through the negligence (if any which is not admitted) of one or more of the engineers of the said steamship in not properly and in due time closing the circulating pump delivery valve which whilst the loading was proceeding had for a short time been reasonably and properly opened in the side of the said steamship, whereby sea water entered the said steamship and caused her to sink or strand as hereinbefore stated. The said steamship was in every way tight staunch and strong and fitted for the voyage and the defendants say that the negligence (if any) of the said engineer or engineers under the circumstances aforesaid is a matter coming within the terms and exceptions of the said charterparty as set forth in paragraph 11 of the defence and that they are not liable for the said damage or any part thereof."

By paragraph 2 of their reply, the plaintiffs, as to paragraphs 11 and 12 of the defence, did not admit that the allegations of fact therein contained were correct, and submitted as matter of law "that the facts as therein stated do not bring the case within the excepted perils of the said charterparty and afford no defence to this action."

On July 29, 1893, at the instance of the plaintiffs, an order was made in the registry that the point of law raised in paragraphs 11 and 12 of the defence should be tried first; but, on the case coming on for argument, on August 4, counsel agreed (on the suggestion of the learned judge that the facts, as alleged in paragraph 12 of the defence, were not sufficiently precise as to the nature of the accident and might lead to difficulty) to submit a written admission of facts (the contents of which have been set out above), and, by consent, the order was accordingly amended so as to run, "that the issues of law, arising on the admitted facts, and in the charterparty and bill of lading, be tried first."

Aug. 8. *Sir Walter Phillimore*, and *Lauriston Batten*, for the plaintiffs. It is submitted that, having regard to the exceptions in the bill of lading, and to the admitted facts, the contract has not freed the defendants. Directly the water came in, by reason of the negligence of the engineer in leaving the valve open, the liability of the shipowner attached, and cannot be got rid of by something such as stranding happening subsequently; nor did the vessel sink or strand where she was owing to the valve being left open, but her master shifted her position and stranded her. Secondly, this was not an "accident of navigation," for the vessel had not left her moorings, and was not in motion; therefore the loss does not fall within that part of the exceptions. Thirdly, the words "unless stranded sunk or burnt" do not prevent the plaintiffs from recovering, for though they create a difficulty as the sentence is rendered inartificial by the awkward way in which in 1890 the words were introduced into the conference bill of lading as settled in 1885 (1), still the meaning can be made out by reading the exception thus: "but unless [the ship be] (from other causes) stranded, sunk, or burnt, nothing herein contained shall exempt," &c., and then the words, "by causes other than those above excepted," must be excluded as inoperative.

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(1) The exceptions in the Mediterranean, Black Sea, and Baltic grain cargo steamer bill of lading, 1885, run as follows:—

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests and restraints of princes, rulers, and people, and other accidents of navigation excepted. Strandings and collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage; but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or of the ships' husband or manager."

[The following cases were referred to: *Good* v. *London Steamship Owners' Mutual Protection Association* (1); *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (2); *The Carron Park* (3); *The Accomac* (4); *The Warkworth* (5); *Laurie* v. *Douglas* (6); *The Xantho* (7); *Hamilton* v. *Pandorf.* (8)]

Cohen, Q.C., and *H. Holman*, for the defendants. The contract between the parties has freed the defendants from liability for any damage sustained by the plaintiffs. The first part of the clause as to "accidents of navigation" would be sufficient to protect the shipowner; but the loss is directly covered as it arose from the negligence of the engineer in improperly leaving open a valve which caused the ship to sink.

The clause may not be well expressed; but looked at from a business point of view, its meaning is obvious. Shippers have been in the habit of insuring their cargo by a policy containing the clause, "Free of particular average unless the ship be stranded," &c., and, therefore, the exception beginning with the words "but unless stranded," &c., has been introduced into charterparties because, by the insurance, the ordinary risk of the transit, so far as average claims are concerned, is thrown upon the cargo owner; but as he has the benefit of any damage if the ship be stranded by having a remedy against his underwriter, the intention is to free the shipowner from responsibility for particular average damage to cargo where the charterer is thus protected by his insurance upon cargo.

[The case of *Steel* v. *State Line Steamship Co.* (9) was referred to.]

GORELL BARNES, J. [After stating the nature of the case, and reading clause 14 of the charterparty, the learned judge proceeded:—] When once the facts are admitted, the whole question

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(1) Law Rep. 6 C. P. 563.
(2) 19 Q. B. D. 242.
(3) 15 P. D. 203.
(4) 15 P. D. 208.
(5) 9 P. D. 20, 145.
(6) 15 M. & W. 746.
(7) 12 App. Cas. 503.
(8) 12 App. Cas. 518.
(9) 3 App. Cas. 72.

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in the case is: What is the true construction of the contract under which the goods were shipped?

It is necessary to consider, in dealing with that question of construction, first, whether or not the loss and damage come within what I may term the first half of the exceptions in the charterparty.

The charterparty and bill of lading are the usual Black Sea charterparty and bill of lading settled in the year 1890 and contain the same exceptions. For convenience the bill of lading has been referred to during the argument. I will continue to refer to it, as the exceptions being the same in both documents it is immaterial which is looked at.

The exceptions material to the first point are the "perils, dangers, and accidents of the sea or other waters of what nature and kind soever, . . . strandings, collisions, and all other accidents of navigation, and all losses and damages caused thereby . . . even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

On these exceptions two points are raised by the plaintiffs. First, whether the words "Even when occasioned by negligence, default," &c., relate to and qualify the words "perils, dangers, and accidents of the sea or other waters of what nature and kind soever." Secondly, whether this was an "accident of navigation" to which it is admitted on both sides that the negligence qualification does apply.

I think when this bill of lading is read from the words "act of God" down to the words "servants of the shipowners" it is clear that the words relating to negligence apply to the whole of the exceptions, for it will be observed that they begin with the act of God and then deal with perils, dangers, and accidents of the sea, and then after a number of other exceptions come these words, "strandings, collisions, and all other accidents of navigation, and all losses and damages caused thereby," and then come the words "are excepted," which to my mind shew that they relate to the whole of the exceptions preceding those words; and then come the words, "even when occasioned by negligence, default, or error in judgment of the pilot and others," which

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to my mind equally apply to all the exceptions which precede the words "are excepted."

It is quite possible that, when this bill of lading was written out for the purpose of its being considered in the year 1890, the writer may have thought that he was applying that negligence clause only to strandings, collisions, and other accidents of navigation and was sufficiently following the form of the old Mediterranean and Black Sea bill of lading of 1885, for which this appears to be in the year 1890 a substitute, but the old form of bill of lading is very different in fact, and there is no doubt that the negligence clause in it only relates to the stranding and collisions, and all damages and losses caused thereby. This is obvious upon the face of it.

In the present bill of lading, however, for the reason I have given, I am of opinion that the negligence clause applies to "dangers and accidents of the sea or other waters" as well as to "accidents of navigation." I do not think, therefore, that it is necessary in this case to put an interpretation upon the words "accidents of navigation" by themselves. I say that because the question raised, which is the second question on the first part of the clause, is to my mind one of some difficulty, namely, whether "accidents of navigation" cover an incursion of water into the ship while she lies at her moorings caused by the use of the valves when the ship is not in any way moving. The reason I have in this case for not expressing a positive opinion upon the point, is that I cannot make out from the admitted facts what was really being done with the circulating-pump, and for what purpose it was being used. The words in the admission of facts are: "The delivery-valve door of the circulating-pump had been opened reasonably for an ordinary and proper purpose whilst the loading was going on by the engineers on board the vessel, but was improperly left open when work ceased on Saturday."

I confess I should like to have known what the purpose was before saying definitely what I think about that exception. The parties have, however, not been able to agree as to that fact, and I do not think it is necessary that they should do so in consequence of what I have held on the other point.

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The inclination of my mind is to consider that even on this admission the words "accidents of navigation" would cover the loss in question because the vessel had a cargo in her, and something was being done for a proper purpose which affected its safety at the time when the accident occurred. But I prefer only to indicate what I am inclined to think rather than to express a positive opinion without further consideration.

In my opinion it follows that the shipowners have brought themselves within the first part of the exceptions. Now comes what has really given rise to the difficulty. There are these words: "but unless stranded, sunk, or burnt, nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or absence of customary ventilation or by improper opening of valves, sluices, and ports, or by causes other than those above excepted." The effect of that, leaving out for the moment "unless stranded, sunk, or burnt," is to say that (so far as it is material to the present case), although the shipowners are not to be responsible for perils, dangers, and accidents of the sea, even when occasioned by negligence; yet if the damage was caused by an improper opening of the valves they are to be liable; and the plaintiffs' contention is that by virtue of this latter part of the clause the shipowners are so liable, and that the words which I omitted, "unless stranded, sunk, or burnt," do not qualify in this case that liability.

There are two readings contended for by the respective parties. The defendants' contention is that the clause should be read thus, and in order to shorten the matter I will leave out the other exceptions which do not affect this case: "but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by improper opening of valves, sluices, and ports, or by causes other than those above excepted, unless the ship be stranded, sunk, or burnt," and they then say that the words "unless stranded, sunk, or burnt" are a condition which gets rid of the various exceptions which are referred to after the words "nothing herein contained shall exempt the shipowner from liability," and leave the shipowner in effect in

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the position in which the first half of the clause of exceptions placed him.

The summary of that really is that the words "unless stranded, sunk, or burnt" are to be treated as a condition on the happening of which the clause in which they are found is rendered of no effect to impose liability upon the shipowner.

The plaintiffs' contention, on the other hand, is that the latter part of the clause has still under the circumstances imposed liability upon the defendants; and I have endeavoured to get some clear expression of how they wish the clause read. Counsel for the plaintiffs suggest that it should be read, "unless the ship be stranded, sunk, or burnt from other causes than those which follow."

Now, I cannot see any ground for inserting those words. It does not seem to me that they naturally come in, and the suggestion counsel for the defendants have made as to the effect of stranding, sinking, or burning as a matter of business on the position of the parties, seems to me rather to indicate that those words ought to be treated as a condition in their simple terms and not have introduced into them any such language as the plaintiffs contend for, and I must say that it took a very long time to get, from the plaintiffs' counsel, the language which it was suggested expressed the meaning of the parties when these words were framed. I should suppose that they were used in the ordinary and natural way in which they are used in a policy of insurance.

For these reasons I think that, in this case, the latter part of the clause has not, so to speak, created any liability on the shipowners from which they were exonerated by the first part of the clause, and therefore the shipowners are entitled to judgment on the questions submitted to me, and as the plaintiffs admit that, if that is so, they do not propose to contest the case further, the result is that, the plaintiffs admitting no further cause of action, judgment will be for the defendants with costs.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb, & Whatton.*
Solicitors for defendants: *Downing, Holman & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1893
Aug. 8.

IN THE GOODS OF HODGKINSON.

Probate—Revocation of Will—Two partly inconsistent Wills—Cancellation of Later Will—Revival of First Will—Wills Act (1 *Vict. c.* 26), *ss.* 20, 22.

A testator by his will gave all his property to J. S., and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister E. and appointed her sole executrix; but he did not expressly revoke the first will. He subsequently cancelled the second will:—

Held (reversing the decision of Gorell Barnes, J.), that the first will was partially revoked by the second, and that the revoked part of the first will was not revived by the cancellation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy.

APPLICATION for probate.

A. Hodgkinson, by a will dated June 4, 1881, gave as follows: "I give all my property of every description to my dear friend Jane Stocks for her sole and separate use absolutely, and appoint her the sole executrix of this my will." On September 5, 1881, the testator made another will in the following words: "I give, devise, and bequeath my share and interest under the will of my late mother to my sister Emma, and appoint her sole executrix of this my will." The testator never cancelled his first will or revoked or altered it otherwise than by his second will. But he afterwards cancelled his second will by cutting off his signature.

The share and interest which the testator took under his mother's will was real estate, and was the only real estate belonging to him.

Gorell Barnes, J., held that the will of September, 1881, having been cancelled by the testator, must be treated as not in existence at the death of the testator; and he granted probate of the whole of the will of June, 1881. From this decision the testator's heir-at-law appealed.

Bargrave Deane, for the appellant. Although the second will, having been cancelled, cannot be admitted to probate, it cannot be treated as a nullity. The first will was partially

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revoked, and the part which was revoked, namely, that which related to the real estate, could not be revived otherwise than by re-execution or by the express words of a codicil. This is clearly laid down by the 20th and 22nd sections of the Wills Act (1 Vict. c. 26). (1) If the whole of the first will had been revoked by the second will, it would not have been revived by the cancellation of the second will; and the same principle applies to the revocation of part of the first will. The decision of the learned judge is inconsistent with *In the Goods of Brown.* (2)

Barnard, for Jane Stocks. The first will has never been revoked at all. The second will was not a revocation of the first, but only an inconsistent disposition of part of the property. The respondent is general devisee and legatee under the first will, and anything not given by a subsequent will or codicil belongs to her. Therefore, when the second will was cancelled the real estate which was given by it passed under the first will. If both documents had existed at the death of the testator, they would both have been admitted to probate. That shews that the first was not revoked, and the second, being now out of the way, the first ought to be admitted as it stands: *Cutto* v. *Gilbert* (3); *Stoddart* v. *Grant.* (4)

Lindley, L.J. Looking at the sections of the Act of Parliament referred to, I think the case is clear. In June, 1881, the testator made a will leaving everything he possessed to Jane

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(1) Sect. 20 enacts: "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Sect. 22: "That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn."

(2) 4 Jur. (N.S.) 244.

(3) 9 Moo. P. C. 131.

(4) 1 Macq. 163.

Stocks. That would include and pass real as well as personal estate. In September in the same year he made another will, by which in effect he gave his real estate to his sister. Then he revoked the second will by cutting off the signature; and then he died. The question is, what is to be done with respect to the probate of the first will? The first will was not wholly revoked—that is clear. Therefore the first must still be proved. But must the whole will be proved in common form, or must the probate be confined, as the appellant claims, to such part of the property as was not comprised in the second will? That turns upon the 20th and 22nd sections of the Wills Act. [The Lord Justice read the sections, and continued:—] The 22nd section appears to me to govern this case. In my opinion it is quite clear that so much of the first will as related to the testator's real estate was revoked by the second will. Then, when the testator destroyed the second will, animo revocandi, the revoked part of the first will was not thereby revived; but the operation of the second will in revoking the first will as to the real estate still remained. Unless we are prepared to say that the revoked part of a will can be revived in some manner not mentioned in the Act, I think that the probate must not stand as it has been granted, but must be limited to so much of the testator's property as was not comprised in the second will. The appeal must be allowed, and the costs of the parties will come out of the real estate.

LOPES, L.J. I assume that the second will was duly cancelled by the testator, and the question is, what is the effect of this cancellation, having regard to the 20th and 22nd sections of the Act? In my opinion the effect is, that the latter will revoked the former will so far as it was inconsistent with it. Although the second will, which was duly executed, has been cancelled, it has rendered inoperative the former will so far as was inconsistent with it; and the former will, so far as it was revoked, cannot be revived except by re-execution or by a codicil. That being so, I am unable to agree with Gorell Barnes, J., that there is no intestacy, and I think the appellant is entitled to have the probate altered.

C. A.
1893

In the Goods of Hodgkinson.

A. L. Smith, L.J. I think that in this case Gorell Barnes, J., has made a slip. In June, 1881, the testator made a will leaving all his property of every description to Jane Stocks, and he appointed her sole executrix of that will. In September, 1881, he made a second will, leaving his real estate to his sister Emma. Both wills were duly executed. It is impossible to say that the first will was not in part revoked by the second. It is obvious that the second will, being duly executed, revoked that part of the first will which affected the real estate. Then the testator destroyed the second will. That being so, what became of that part of the first will which was revoked? It was not revived; that is perfectly clear under the Wills Act. It must, therefore, remain revoked, and the probate must be granted in the limited form.

Appeal allowed.

Solicitors: *Marsland, Hewitt, & Urquhart, for J. Hewitt & Son, Manchester; Merriman, Pike, & Merriman, for Partington & Allen, Manchester.*

M. W.

ORDER IN COUNCIL.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT,
The 30th day of January, 1893.

PRESENT,

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 11th day of August, 1884, Her Majesty on the joint recommendation of the Admiralty and the Board of Trade was pleased to direct that on and after the 1st day of September, 1884, the Regulations contained in the Schedule thereto should, so far as regards British Ships and Boats, be substituted for the Regulations contained in the First Schedule to an Order in Council made as aforesaid, and dated the 14th day of August, 1879.

And whereas by two Orders in Council made in pursuance of the said Act, and on such joint recommendation as aforesaid, and dated respectively the 30th day of December, 1884, and the 24th day of June, 1885, certain modifications and additions were made to the said Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August, 1884, as regards British fishing vessels and boats.

And whereas by another Order in Council made in pursuance of the said Act and on such joint recommendation as aforesaid, and dated the 18th day of August, 1892, certain modifications and additions were made to the said Regulations contained in the Schedule to the said recited Order in Council of the 11th August, 1884, as regards Steam Pilot vessels. (1)

And whereas by the said Regulations contained in the Schedule to the said Order in Council of the 11th day of August, 1884, it is amongst other things provided as follows:—

Art. 3.—A sea-going steam ship when under way shall carry—

(*a*) On or in front of the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b*) On the starboard side, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character

(1) The Order in Council of August 18, 1892, modified art. 9 of the Order in Council of August 11, 1884 (see 9 P. D. Appendix), by adding the following provisions as to *steam Pilot vessels*, viz.:

"A Steam Pilot vessel exclusively employed for the service of Pilots licensed or certified by any Pilotage authority or the Committee of any Pilotage District in the United Kingdom, when engaged on her station on pilotage duty and in British Waters, and not at anchor shall in addition to the lights required for all Pilot-boats carry at a distance of eight feet below her White Masthead light a red light visible all round the horizon, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles and also the coloured side lights required to be carried by vessels when under way.

"When engaged on her station on pilotage duty and in British waters and at anchor she shall carry in addition to the light required for all Pilot-boats the red light above mentioned but not the coloured side-lights.

"When not engaged on her station on Pilotage duty she shall carry the same lights as other steam vessels."

as to be visible on a dark night with a clear atmosphere, at a distance of at least two miles.

(*c*) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d*) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 15.—If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and by night to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply by day, to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other; or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

And whereas there has been doubt or misapprehension concerning the effect of the said two articles and whereas the

Admiralty and the Board of Trade have jointly recommended to Her Majesty to make the following additions to the said Regulations for the purpose of explaining the said recited Articles, and of removing the said doubt or misapprehension.

Now, THEREFORE, Her Majesty, by virtue of the powers vested in Her by the said Act, and by and with the advice of Her Privy Council, is pleased to direct that from the date of this Order the Regulations contained in the Schedule to the said Order in Council of the 11th day of August, 1884, shall be further modified by the addition to the said recited Article 3 of the provisions contained in the Schedule hereto.

HERBERT M. SUFT.

SCHEDULE.

(*e.*) To ensure that the red and green side lights shall show an uniform light from right ahead of the ship to two points abaft the beam on the port and starboard sides respectively, and shall not show across the bow of the ship itself, the said lights must be fixed and the screens fitted so that the rays from the red and green lights shall cross the line of the ship's keel projected ahead of the ship at a reasonable distance ahead of the ship.

With regard to all vessels whose lights are inspected by the officers of the Board of Trade the red or green side light will not be deemed to be fixed and fitted in accordance with the Regulations unless it is so fixed and screened that a line drawn from the outside edge of the wick to the foremost end of the inboard screen of such light shall make an angle of 4 degrees, or as near thereto as may be practicable, with a line drawn parallel with the keel of the ship from the outside edge of the wick.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1894, will be as follows:—

In the First Series,
[1894] 1 Ch. [1894] 2 Ch. [1894] 3 Ch.

In the Second Series,
[1894] 1 Q. B. [1894] 2 Q. B. [1894] P.

In the Third Series,
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CHURCHYARD—*continued.*
otherwise appropriated under the Act, should remain for ever unbuilt upon, and unappropriated to any purpose except such ornamental purpose as the Corporation, with the consent of the Bishop of London, might direct. After the provisions of these Acts as to the vesting of the churchyard of St. Benet Fink had become operative, the Corporation of the City of London and the rector of the united parish of St. Peter-le-Poer with St. Benet Fink, and the churchwardens of St. Benet Fink, petitioned the Court to decree a faculty for the construction in the churchyard of St. Benet Fink of an underground chamber to be used for the transformation of electricity:—*Held*, that the Court was not precluded by the local Acts relating to the churchyard from granting the faculty prayed for. In re St. Nicholas Cole Abbey. In re St. Benet Fink, Churchyard [58

CLERGY—*Jurisdiction—The Clergy Discipline Act*, 1892 (55 *& 56 Vict. c.* 32), *ss.* 2, 12—*Complaint against Clergyman for Immorality—Offence of occasioning Scandal by Immoral Conduct not justiciable by Chancellor of Diocese sitting with elected Assessors—Amendment of Complaint—Charge of Habitual Drunkenness—Practice.*] The complaint in a criminal suit tried before the Chancellor of the Diocese of Rochester sitting with assessors, under the Clergy Discipline Act, 1892, after charging the defendant, a clergyman holding preferment within the diocese of Rochester, with certain specified offences against morality, further charged him with "occasioning grave scandal and offence in the parish of which he was incumbent by his scandalous conduct in the several preceding charges set forth":—*Held*, that the ecclesiastical offence of "occasioning scandal and evil report" was not an offence which could be legally tried under the Clergy Discipline Act, 1892, and that all reference to any such charge must be struck out of the complaint. Practice of the Consistory Court of Rochester as to admitting to proof in a criminal suit charges of habitual drunkenness and of acts of drunkenness, the precise dates of which the prosecutor cannot specify. Bishop of Rochester *v.* Harris 137

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ADMINISTRATION—*Grant to Representatives of Wife's Next of Kin without the Knowledge of Husband—Fraud—Application to revoke—County Court—Appeal*—20 *& 21 Vict. c.* 77, *ss.* 54 *to* 58—21 *& 22 Vict. c.* 95, *s.* 11—51 *& 52 Vict. c.* 43, *s.* 120.] A husband and wife separated in 1863, and the wife went back to her mother's house, resuming her maiden name. In 1881 she died, and letters of administration to her estate were taken out by the executors of her father's will as if she had been a spinster, although it appeared that one of them knew she was a married woman. In 1888 the husband first became aware of his wife's death, and, after making inquiries, he instituted a suit in the county court for the revocation of the grant. The county court judge directed a non-suit on the ground that no such fraud had been shewn as to justify him in revoking the letters of administration:—*Held*, that the county court judge was wrong in holding that fraud must be shewn to justify him in revoking the grant of administration; that his decision was upon a "point of law" within the meaning of s. 58 of 20 & 21 Vict. c. 77, so that the Probate Division had jurisdiction to entertain an appeal; and that the point of law was sufficiently raised at the hearing by the pleadings and the nonsuit to comply with s. 120 of the 51 & 52 Vict. c. 43. The Court, therefore, revoked the letters of administration and made a new grant to the husband. Copeland *v.* Simister - - Div. Ct. 16

ADMINISTRATION—*continued.*

2. —— *Lost Will—Grant of Administration until Will Found.*] Upon an application for a grant of administration until a lost will should be found, it appeared that the testator had duly executed a will, but that it could not be found after his death, and, his widow who refused to attend and be examined having stated that it had been accidentally destroyed, there was no evidence as to its contents:—*Held*, that a grant of administration of the estate and effects of the deceased might be made to his only son with the consent of the other next of kin, limited to dealing with certain specified property, until such time as the will might be forthcoming. In the Goods of Wright - - - - 21

3. —— *Will of Foreign Subject resident Abroad—Foreign Sureties to the Administration Bond—Practice.*] The testator, a French subject resident in France, made a will there by which he constituted a domiciled French subject his universal and residuary legatee. Part of the estate was in the English Funds, and there were no debts in this country:—*Held*, on application for administration with will annexed, that the administratrix might give an administration bond with two foreign sureties. In the Goods of De Beaufort - - - - - 231

ADMINISTRATION WITH WILL ANNEXED—*Will—Disappearance of Executor—Administra-*

ADMINISTRATION WITH WILL ANNEXED—*continued.*

tion with Will annexed to Deceased's Sole Beneficiary—20 & 21 Vict. c. 77, s. 73.] An executor, before the death of the testator, left the country under an assumed name, having sold all his effects, and there was reason to believe that he did not intend to return:—*Held*, that administration with the will annexed might be granted to the testator's widow, who was the sole beneficiary, without requiring the executor to be cited. In the Goods of Crawshay - - 108

2. —— *Two Wills—No Executor named in Second—Wife sole Beneficiary—Grant to Wife—Securities dispensed with—Personal Bond only required.]* A testator having duly executed a will placed it among his papers, and being unable to find it subsequently executed a second will. By both wills he made his wife his universal legatee, and in his first will he appointed her his sole executrix; but in the second will he made no appointment of executrix:—*Held*, on a motion for probate of both wills that administration ought to be granted to the widow, with the last will annexed, but that she might give her personal bond without being required to find securities. In the Goods of Allen - - - - 184

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EXECUTION — *Will — Due Execution—1 Vict. c. 26, s. 9.]* The two attesting witnesses to a will were father and son, both working at the same workshop, but on different floors. The testator produced his will first to the father alone, and, telling him it was his will, asked him to witness it. The testator's signature was already on the will, and the father signed it. The testator then asked that the son, who was working on the floor below, should be called in, and when he came in asked him to witness the paper, saying, in answer to questions, "It is a bit of ordering of my affairs. I have signed it, and your father has signed it." The son then signed the will, all three being present:—*Held*, that the will was not duly executed in accordance with the requirements of 1 Vict. c. 26, s. 9. Wyatt *v.* Berry - 5

2. —— *Will—Foot or End—Probate of Part only.]* The signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will—immediately after an unfinished sentence, which was completed overleaf on the second page:—*Held*, that probate might be granted of the first page of the will. In the Goods of Anstee - - - - 283

FOREIGN WILL—Administration with will annexed—Foreign sureties to administration bond - - - 231
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INSANITY — *Will — Testamentary Capacity — Lunatic so found by Inquisition—Evidence—"Chancery Visitors'" Reports—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 184, 185, 186—Costs.]* By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 184, the "Chancery visitors" shall visit lunatics so found by inquisition and make inquiries as to their mental and bodily health and otherwise respecting them. By s. 185, the Chancery visitors shall respectively make reports on any cases to the Lord Chancellor. By s. 186, (1.) the reports of the Chancery visitors shall be filed and kept secret in their offices and shall not be open to the inspection of any person save the members of the board of visitors and the judge in lunacy and such persons as he specially appoints. (2.) All the reports relating to any particular patient shall be destroyed on his death. . . .—In an action to obtain probate of the will of a lunatic so found by inquisition two of her next of kin opposed probate on the ground of her insanity at the date of the will. The chairman of the Board of Chancery Visitors was examined on behalf of the defendants, and admitted that the reports made by himself and his colleagues were still in existence, but refused to produce them on the ground that he was precluded by s. 186 of the Act of 1890 from making them public:—*Held*, by Gorell Barnes, J., after consultation with Esher, M.R., and Lindley, Bowen, Lopes, and Kay, L.JJ., that the reports must be treated as non-existent, and that no order could be made for their production.—The jury having found for the will, probate of it was granted, and the Court, on the authority of *Davies* v. *Gregory* (Law Rep. 3 P. & D. 28), allowed the costs of all parties out of the estate. Roe *v.* Nix - - - - - 55

LOST WILL—Administration—Grant of administration until will found - - 21
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PRACTICE—*Will—Dependent Relative Revocation—Grant of Probate refused on Motion.]* A testator executed two wills, one in 1872 and the other in 1892. By the first he left all his property to his wife, and by the second he made no provision for her. Shortly before his death he asked that the two wills might be brought to him, and he directed his wife to burn the later will, which she did, and he then handed to her the earlier will, saying, "Now you will be mistress of all."—After his death letters of administration were granted to his widow, upon the assumption that the destruction of the will of 1892 which revoked all previous wills, had caused an intestacy:—*Held*, that, inasmuch as there were infants interested under the earlier will who could not consent, the Court would not revoke the letters of administration and grant probate of the later will on motion, but would require such will to be propounded. In the Goods of Andrews [14

2. —— *Citation — Compromise — Attorney-General cited to give to his Sanction.]* A testator

PRACTICE—*continued.*

by his will bequeathed the residue of his real and personal estate for the establishment of an agricultural college. The will was disputed by one of his next of kin who was also heiress-at-law; but a compromise was agreed to, by which the will was to be proved in solemn form without opposition. The Attorney General, as interested in the disposal of the residue, was cited, and appeared at the hearing to give his sanction to the compromise. BOUGHEY *v.* MINOR - - 181

3. —— *Will and Codicils—Probate—Writing on back of Codicil—Blank piece of paper pasted over Codicil—Order for Removal.*] A testatrix left a will and two codicils duly executed. She had made various alterations in the codicils, and among others she had written some words at the back of the first codicil, and had subsequently pasted a piece of blank paper over them.—The Court made an order that the paper should be removed, in order to ascertain what the words were. IN THE GOODS OF GILBERT - - - 183

4. —— *Probate—Two Testamentary Documents—One only Executed—Probate of the executed Document, with directions to Administer the Estate in conformity with the Trusts of the unexecuted Document.*] A testatrix left two testamentary documents, of which only one was duly executed. The first or unexecuted document made various specific bequests, and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew, "for the purposes I require him to do absolutely":—*Held*, that the two documents could not be admitted to probate as together constituting the will of the deceased, but that probate might be granted of the second or executed document, with directions to the executor to administer the estate in conformity with the trusts of the first document. IN THE GOODS OF MARCHANT [254

5. —— *Probate—Torn Will — Grant — No Notice to Persons interested in Intestacy—Security for Shares of Absentee.*] Upon an application by the widow of a testator for probate it appeared that, while suffering from softening of the brain, he had torn his will in pieces, and that the pieces had been collected and pasted together. The will left the estate to his wife for life, and after her death to his two sons, who were both abroad. The eldest son had advised his mother to take out probate; but no notice of the application had been given to the younger son:—*Held*, that probate might be granted to the widow on her giving security for one-third of the personal estate of the deceased, to cover the share to which the younger son would be entitled in the case of an intestacy. IN THE GOODS OF HINE - 282

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REVOCATION—*Will—Misapprehension.*] A testatrix left two wills, and a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that as it only related to the insurance policy the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance the testatrix duly executed the will:—*Held*, on the authority of *Morell* v. *Morell* (7 P. D. 68), that the testatrix must be taken to have known and approved of these words of revocation, and that they must be included in the probate of the last will. COLLINS *v.* ELSTONE - - - - - 1

2. —— *Will—Two partly inconsistent Wills—Cancellation of Later Will—Revival of First Will—Wills Act* (1 *Vict. c.* 26), *ss.* 20, 22.] A testator by his will gave all his property to J. S., and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister E. and appointed her sole executrix; but he did not expressly revoke the first will. He subsequently cancelled the second will:—*Held* (reversing the decision of Gorell Barnes, J.), that the first will was partially revoked by the second, and that the revoked part of the first will was not revived by the cancellation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy. IN THE GOODS OF HODGKINSON - - - - C. A. 339

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ADULTERY—*Bigamous Marriage of Petitioner—Ignorance of Law—Discretion—20 & 21 Vict. c.* 85, *s.* 31.] A husband and wife separated and signed an agreement by which each of them agreed that the other should be at liberty to marry again. The husband, believing that his marriage was legally dissolved, went through the ceremony of marriage with another woman, and cohabited with her; but, being advised that the agreement which he had signed was worthless, he left her, and resumed cohabitation with his wife, who was afterwards guilty of adultery with the co-respondent. The husband then presented a petition for divorce on the ground of his wife's adultery:—*Held*, that, as the petitioner acted as he did in the bonâ fide belief that the agreement which he had signed constituted a legal dissolution of the marriage, the Court was justified in the exercise of its discretion in granting him a divorce. Whitworth *v.* Whitworth - 85

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—— *Story* v. *Story* (12 P. D. 196) approved 292
See Condonation.

CONDONATION—*Claim for Damages after Condonation—Divorce and Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *sub-ss.* 30, 33, 59.] At the trial of a petition by a husband for divorce, on the ground of the adultery of his wife with two co-respondents, and claiming damages against one of such co-respondents, the jury found that the respondent had been guilty of adultery with both co-respondents, but that the petitioner had condoned the adultery with the one against whom damages were claimed, and that no damages were payable by such co-respondent in respect of the adultery committed by him. It appeared that the condonation was subsequent to the adultery with both co-respondents, and that at the time of the condonation the petitioner did not know of the adultery with the other co-respondent. A decree nisi was granted by the President, on the ground of the adultery with the co-respondent whose adultery had not been condoned; but as against the other the petition was dismissed with costs:—*Held*, by the Court of Appeal, that the decision of the President was right; for that a condonation by a husband of adultery with one person is not avoided by the fact that the wife had previously to the condonation committed acts of adultery with another person of which he was not aware; and that, although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer, but only went in mitigation of damages, the case is different under the Divorce and Matrimonial Causes Act, 1857; and where, on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery has been condoned, the petitioner is not entitled to a judgment, even for nominal damages, against the co-respondent; but the petition will be dismissed, and the petitioner may be ordered to pay the co-respondent's costs. *Story* v. *Story* (12 P. D. 196) approved. *Pomero* v. *Pomero* (10 P. D. 174) overruled. Bernstein *v.* Bernstein - - - - C. A. 292

—— Deed of separation—Covenant not to commence or prosecute proceedings in relation to antecedent offences - 99
See Judicial Separation.

COSTS—Attachment—Undischarged bankrupt—Order - - - - 289
See Practice.

—— Divorce—Dismissal of wife's petition—Unnecessary charges of cruelty—Rule 159
See Practice. 3. [222

DOMICIL—Divorce—English marriage—American divorce - - - - 89
See Foreign Law.

ESTOPPEL—Divorce—Queen's Proctor's Intervention - - - - 185
See Practice. 4.

FOREIGN LAW—*Domicil—English Marriage—American Divorce.*] In the petition by a husband for dissolution of marriage on the ground of the adultery of his wife, it appeared that the petitioner was a British subject, resident and carrying on business in London, and the respondent was an American, domiciled in the State of Pennsylvania. They were married in London, and cohabited there [for some months, when the re-

FOREIGN LAW—*continued.*
spondent went to Philadelphia partly, as she alleged, to visit her mother who was ill, and partly to be present at the marriage of her sister. She never returned to her husband, and after repeated attempts to induce him to consent to an amicable separation, she commenced a suit for divorce in the Court of Common Pleas at Philadelphia, on the ground of cruelty. By the statute law of Pennsylvania, the Courts of the State had jurisdiction over all matrimonial causes, where it could be shewn by any wife that she was formerly a citizen of the commonwealth, and that having intermarried with a citizen of any other State, she had been forced to abandon the domicil of her husband by reason of his cruelty or adultery, and had been domiciled within the jurisdiction for a whole year before the commencement of the suit. The petitioner was personally served with notice of this suit, but did not appear, and the Court of Philadelphia pronounced a decree of divorce. The respondent immediately afterwards married the co-respondent, and they subsequently lived together as man and wife in the United States:—*Held*, that the case of the petitioner had been proved, and that he was entitled to the decree claimed by his petition, for the Court of Philadelphia had no jurisdiction to pronounce a decree dissolving the marriage of a British subject domiciled in this country, who had never submitted himself to its jurisdiction. GREEN *v.* GREEN - - - 89

INTERVENTION—Queen's proctor—Estoppel
See PRACTICE. 4. [185

JACTITATION OF MARRIAGE.] At the hearing of a suit of jactitation of marriage brought by the supposed wife, Gorell Barnes, J., left the following questions to the jury—first, was there a legal marriage between the petitioner and respondent; and secondly, had the petitioner acquiesced in the representation of the respondent that she was his wife.—The jury disagreed on the first question; but they found that the petitioner had allowed herself to be represented as the respondent's wife:—*Held*, that, upon this finding the petition must be dismissed. THOMPSON *v.* ROURKE - - - - - - 11

2. —— In a suit of jactitation of marriage brought by the supposed wife, the jury found that she had at a former period acquiesced in the representations of the respondent that she was his wife:—*Held*, affirming the decision of Gorell Barnes, J., that upon this finding the petition must be dismissed. THOMPSON *v.* ROURKE [C. A. 70

JUDICIAL SEPARATION—*Deed of Separation—Covenant not to commence or prosecute Proceedings in relation to antecedent Offences—Condonation—Discretionary Bar—Dismissal of Petition.*] A husband and wife had separated in 1886 under a deed which contained the following clause: "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents." In 1890 the wife presented a petition for judicial separation on the ground of adultery committed in the years 1889 and 1890, and the husband in his answer charged his wife with adultery committed in the years 1884 and 1885. At the trial both parties were found guilty of adultery:—*Held*, that the covenant in the deed of separation was not equivalent to condonation, and that it did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed. GOOCH *v.* GOOCH - - - - 99

PRACTICE—*Attachment — Costs — Undischarged Bankrupt — Order.*] The respondent — the husband—in a suit for divorce was an undischarged bankrupt, but was shewn to be in receipt of a weekly salary of 30*l.*, which was not under the control of the trustee in bankruptcy. An order had been made by the Court, and duly served on him, to pay into Court or give security for the sum of 40*l.*, to cover the wife's costs of the hearing of her petition; but although nearly two years had elapsed from the date of such order he had failed to comply with it:—*Held*, that the fact that the respondent had been adjudged bankrupt did not preclude the Court from issuing an attachment—and the Court made an order accordingly. SHINE *v.* SHINE - - 289

2. —— *Decree Nisi—Petition for Maintenance—Matrimonial Causes Act,* 1857 (20 & 21 *Vict.* c. 85), *s.* 32.] The effect of s. 32 of the Matrimonial Causes Act, 1857, and the Rules and Regulations made under the provisions of the Divorce Acts, is to enable the Court, before a decree nisi for divorce has been made absolute, to confirm the report of the registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife upon the decree becoming absolute, and in the meantime to restrain him from dealing with his property so as not to leave sufficient security. WATERHOUSE *v.* WATERHOUSE - - - C. A. 284

3. —— *Dismissal of Wife's Petition—Unnecessary Charges of Cruelty—Costs—Rule* 159.] In a petition by a wife for divorce on the ground of adultery and cruelty, the petitioner, in addition to charging the respondent with the communication of venereal disease to her, which was the only evidence of adultery, made general charges of cruelty, as to which the respondent pleaded condonation. At the trial the jury found all the issues in favour of the respondent, and the petition was dismissed:—*Held*, on application to allow the petitioner the full costs of the suit, that she was entitled to the costs of the main charge of cruelty and of adultery contained in it; but that, inasmuch as the other acts of cruelty charged had been obviously condoned, the charges in respect of them were equally unnecessary, whether the main charge failed or succeeded, and she was not entitled to the costs in regard to such charges. ASH *v.* ASH - - 222

4. —— *Queen's Proctor's Intervention—Previous Findings of Adultery, Cruelty, and Collusion against the Petitioner — Res adjudicatæ—Estoppel—Discretion—*20 & 21 *Vict.* c. 85, *s.* 30.] Upon an intervention by the Queen's Proctor for

PRACTICE—*continued.*
the purpose of shewing cause against a decree nisi obtained by a husband in a petition for divorce on the ground of his wife's adultery, it appeared that at a trial of cross-petitions previously presented by the husband and wife against each other, it had been arranged that the husband should submit to a decree nisi being pronounced on the ground of his adultery and cruelty, and should withdraw his petition against his wife. It also appeared that on an intervention by the Queen's Proctor to rescind such decree nisi on the ground of collusion, suppression of material facts, and the wife's adultery, the jury had found that there had been collusion and suppression of material facts, but were unable to agree as to the wife's adultery, whereupon the decree nisi was rescinded and the petition dismissed. The Queen's Proctor in the present intervention pleaded that the findings of the juries at the former trials operated as an estoppel against the husband in the present petition, and that the adultery, cruelty, and collusion found against him were res adjudicatæ which disentitled him to relief:—*Held*, on motion of the Queen's Proctor to dismiss the petition, that though the previous findings must be taken as conclusive evidence that the petitioner had been guilty of adultery, cruelty, and collusion, they did not amount to an estoppel, and that it would be open to the petitioner at the trial of the issues raised by the present intervention to shew that the collusion was not in regard to the present petition, and that the circumstances were such as to induce the Court to grant relief notwithstanding the findings of adultery and cruelty. BUTLER *v.* BUTLER 185

5. —— *Wife's Suit—Decree Nisi—Intervention by Queen's Proctor—Refusal to allow the alleged Adulterer to intervene.*] A wife obtained a decree nisi, but the Queen's Proctor subsequently intervened, and alleged that the petitioner was living in adultery with one D. J.:—*Held* (in chambers), that D. J. was not a party to the suit, and could not be admitted to intervene. GRIEVE *v.* GRIEVE [288

6. —— *Queen's Proctor's Intervention and Appearance—No Plea filed—Resumption of Cohabitation—Decree Nisi rescinded.*] The petitioner had obtained a decree nisi dissolving his marriage on the ground of his wife's adultery. Subsequently, his solicitors informed the Queen's Proctor that he had forgiven his wife and taken her back to live with him, and that he did not intend to take steps to have the decree made absolute. On affidavits from the husband and wife that they were living together again, the Court made the usual order rescinding the decree and dismissing the petition without requiring the Queen's Proctor to file a formal plea. FLOWER *v.* FLOWER - - - - - 290

—— Condonation—Claim for damages after condonation - - - - 292
See CONDONATION.

QUEEN'S PROCTOR—Intervention—Divorce 288
See PRACTICE. 5.

—— Intervention—Previous findings of adultery, cruelty and collusion against the petitioner—Estoppel - - - 185
See PRACTICE. 4.

—— Intervention—Resumption of cohabitation—Rescission of decree nisi - - 290
See PRACTICE. 6.

SEPARATION DEED—Judicial separation—Condonation - - - 99
See JUDICIAL SEPARATION.

SETTLEMENTS, VARIATION OF—*Settlement of Wife's Property—Provision for Husband and Children—Amount of Allowance fixed or variable—Dum solus Clause—Provision for Children not limited to the Age of Sixteen—The Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 35, 45.] On a petition for the settlement of the property of a wife found guilty of adultery, for the benefit of her husband and the children of the marriage, it appeared that the wife's income amounted to 1140*l.* a year, consisting chiefly of a life interest in leasehold property under the will of her father; and the husband's income was 350*l.*, derived from his business. The Court ordered the wife to settle 250*l.* for life on her husband, and 60*l.* a year on each child, and refused to make the allowance to the husband variable according to the possible fluctuation in the value of the wife's property, or to limit it to such time as he should remain unmarried, or to order that the allowance to the children should cease at the age of sixteen. MIDWINTER *v.* MIDWINTER - - - 93

STATUTES:—
20 & 21 Vict. c. 85, s. 30 - - - 185
See PRACTICE. 4.
—— —— sub-ss. 30, 33, 59 - - 292
See CONDONATION.
—— —— s. 31 - - - - 85
See ADULTERY.
—— —— s. 32 - - - - 284
See PRACTICE. 2.
—— —— ss. 35, 45 - - - 93
See SETTLEMENTS, VARIATION OF

ADMIRALTY.

APPORTIONMENT—Classification of salvors—Non-navigating portion of crew - 147
See SALVAGE. 3.

ARREST—*Ship—Wrongful Arrest—Crassa Negligentia—Mala fides—Damages.*] Proof of actual damage is not necessary to sustain an action in a court of Admiralty for wrongful arrest, if the seizure of the vessel was the result of mala fides, or crassa negligentia implying malice.—*Semble*, an action lies at common law for malicious arrest of a ship by Admiralty process. THE WALTER D. WALLET - - - - 202

BILL OF LADING—*Excepted Perils—" Act, neglect, or default of the pilot, master, or mariners in the . . . management of the ship"—Negligent Stowage of Stevedore—Shipowner's Liability.*] The plaintiff shipped a quantity of oranges on board the defendants' vessel, under a bill of lading, excepting (inter alia) " damage from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship."—The oranges were damaged by the negligent stowage of the stevedore :—*Held*, that the defendants were not protected by the exception in the bill of lading, as the stevedore was not included in the list of persons whose acts, &c., were excepted, and the words " management of the ship" did not include improper stowage. The Ferro - - - - **Div. Ct. 38**

—— Damage to cargo—Negligence clause—" Accident of navigation" - 329
See Charterparty. 3.

CHARTERPARTY—*Strike Clause—Customary Mode of Discharge—Demurrage—Practice—Appellate Jurisdiction—Cross Appeal.*] The defendants chartered the plaintiffs' vessel to load a cargo of timber, and therewith proceed to Sharpness and deliver the same " cargo to be . . . taken from alongside vessel as customary at port of . . . . discharge . . . . (and) to be discharged with the customary steamer despatch of the port . . . . Sundays . . . . any time lost by reason of . . . . strikes, lock-outs, or combinations of workmen—whether partial or general—not to count as part of the . . . . discharging time . . . . If, through any fault of the merchants or charterers, the vessel be longer detained, demurrage to be paid at the (agreed) rate . . . . The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed." The customary mode of discharging timber at Sharpness is into lighters, by which the timber is taken up the canal to Gloucester, but when the vessel arrived on a Wednesday at Sharpness there were no lighters available, owing to a strike in the port of Gloucester amongst the labourers in the timber trade, who discharged the lighters there, so that all the timber lighters were waiting at Gloucester to be unloaded. The strike at Gloucester came to an end on the Friday. On Saturday the discharge commenced, and was completed by noon on the following Tuesday week, that is, on the eleventh day (excluding Sundays) after the vessel's arrival. According to the customary steamer despatch the discharge would have occupied four-and-a-half days.—The plaintiffs sued the defendants in the county court for five days twenty-two hours' demurrage. The county court judge, after referring to *Nielsen* v. *Wait* (16 Q. B. D. 67), and holding that Sharpness is within the port of Gloucester, found that, after the strike came to an end, the defendants, with the exception of one day on which they were in default, did all that could reasonably be expected to discharge the vessel, and gave judgment for the plaintiffs for 22*l.* 5*s.* 10*d.*, one day's demurrage.—The plaintiffs appealed :—*Held*, by the Divisional Court (Sir F. H. Jeune, President, and Gorell Barnes, J.)—affirming the judgment of the county court judge—that the defendants were not responsible beyond the one day, as the parties contemplated the customary mode of discharge, which was by lighters, and the discharge in that manner was delayed by the strike within the meaning of the charterparty.—*Held* also that, as the Divisional Court had only an appellate jurisdiction, the defendants could not be allowed to argue by way of cross-appeal against the judgment for one day's demurrage, as they had no right to originate an appeal questioning a judgment for an amount under 50*l.* depending upon an issue of fact. The Alne Holme - - - - **Div. Ct. 173**

2. —— *Time for Discharge of Cargo—Despatch Money—Sundays and Fête Days Excepted.*] The plaintiffs' steamer was chartered by the defendants to carry a cargo of coals, " to be discharged at the rate of 200 tons per day weather permitting (Sundays and fête days excepted) according to the custom of the port of discharge and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved" :—*Held*, that Sundays and fête days were excluded both in the computation of the time allowed for discharging, and in that of the time saved, so that despatch money, by way of set-off to a claim for freight, was only payable, by the plaintiffs to the defendants, on the difference between the number of hours actually occupied by the defendants in the discharge, and the total number of hours which the charterparty allowed them. The Glendevon [**Div. Ct. 269**

3. —— *Carriage of Goods—Bill of Lading—Damage to Cargo—Negligence Clause—" Accident of Navigation."*] By charterparty and bill of lading the defendants were exempted from liability for damage to the plaintiffs' cargo arising from " . . . . perils, dangers and accidents of the sea or other waters of what nature and kind soever; . . . strandings . . . and all other accidents of navigations, and all losses and damages caused thereby . . . even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship-owners, but unless stranded, sunk or burnt nothing herein contained shall exempt the ship-owner from liability to pay for damage to cargo occasioned by . . . improper opening of valves, sluices and ports, or by causes other than those above excepted . . ."—Whilst the defendants' steamship was lying at her moorings, loading the plaintiffs' cargo of grain, under the above charterparty and bill of lading, the circulating-pump delivery-valve in the side of the ship was reasonably and properly opened by the defendants' engineer, but was negligently and improperly left open, whereby a quantity of sea-water entered the ship and damaged the plaintiffs' cargo. To prevent the vessel foundering at her moorings, where the water was deep, the master had her towed into shallower water, where she settled on the ground, and the water was subsequently pumped out.—For the loss so sustained the plaintiffs sued the defendants :—*Held*, that the defendants were not liable as the negligence clause applied to " dangers and accidents of the sea or other waters," as well as to " accidents of

CHARTERPARTY—*continued.*

navigation," and the words "unless stranded, sunk or burnt" constituted a condition preventing liability attaching to the shipowner for the damage occasioned by the valve being improperly open.—*Semble*, that the defendants were also protected because the damage resulting from the incursion of water into the ship—caused by the use of the valve, whilst she had cargo in her, though she was still at her moorings and not in motion—was an "accident of navigation" within the meaning of the exception in the first part of the clause in question. THE SOUTHGATE 329

—— Chartered homeward freight—Foreign statement clause—General average - 189
See INSURANCE, MARINE.

COLLISION—*Thames Rules, r.* 20—*Anchor not stock awash by order of Compulsory Pilot—Contributory Negligence.*] In daylight, in the river Thames, a tug negligently came into collision with a steamer, and sustained damage from the anchor which, in breach of rule 20 of the Thames Rules, the steamer was carrying, by order of a compulsory pilot, at the hawse-pipe instead of stock awash. Those in charge of the tug were aware of the position of the anchor; but, after the negligent act of the tug had produced risk of collision, there was no time for those in charge of the steamer, by lowering the anchor or otherwise, to avert the damage.—In an action of damage by collision, brought by the owners of the tug against the steamer:—*Held*, that the owners of the steamer were not responsible, for though the Thames rule was infringed, the position of the anchor was a matter within the province of the pilot in navigating the vessel, and, secondly, though the steamer was guilty of negligence in breaking the rule, still the tug, by ordinary care, exerted up to the moment of the collision, might have avoided it, and the consequent damage. THE MONTE ROSA - - - - - - - 23

2. —— *Fog—Regulations for Preventing Collisions at Sea, Art.* 18.] By art. 18 of the Regulations for Preventing Collisions at Sea: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."—During a fog, in the neighbourhood of the Owers Light, in the English Channel, the whistle of the steamship *A.*, bound eastward, was first heard, by the master of the steamship *L.*, bound westward, a point or a point and a half on his starboard bow, and the sound of the whistle gradually broadened until it reached two and a half to three points on that bow. As the next whistle did not seem to broaden, the master of the *L.* stopped his engines. On hearing the next whistle he was satisfied that the *A.* was porting, and closing rapidly on his starboard bow (as, in fact she was), and he thereupon reversed his engines.—The two vessels came into collision, though, but for the *A.* porting, they would have passed, starboard to starboard, on nearly parallel and opposite courses. The speed of both vessels was moderate.—In an action of damage, both vessels were held to blame, the *A.* for porting and not stopping, the *L.* for not slackening her speed earlier.—The owners of the *L.* appealed:—*Held*, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), that the Court was bound by the decision in *The Ceto* (14 App. Cas. 670), to dismiss the appeal, as, when the *L.* stopped, the indications were not such as to shew to the master of the *L.* distinctly and unequivocally that, if both vessels continued to do what it appeared they were doing (that is, the *L.* proceeding slowly on, and the *A.* porting towards the *L.*) they would pass clear without risk of collision. THE LANCASHIRE - - - - - C. A. 47

3. —— *Overtaking Ship — Regulations for Preventing Collisions at Sea, Arts.* 16, 20.] By art. 16 of the Regulations for Preventing Collisions at Sea, "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."—By art. 20, ". . . every ship . . . overtaking any other, shall keep out of the way of the overtaken ship."—The steamship *M.*, proceeding, at night, down the Bristol Channel, at a speed of seven and a half knots an hour, on a W. course, gradually overhauled the steamship *B. H.*—proceeding at seven knots an hour, on a W. ½ N. course—until she had drawn up on the starboard beam of the *B. H.* when the *M.* altered her course to W.S.W., and a collision occurred—The *M.* charged the *B. H.* with (inter alia) a breach of art. 16. The *B. H.* charged the *M.* with a breach of art. 20. The Court found the *M.* alone to blame and:—*Held*, that the obligation upon the *M.*, under art. 20, as the "overtaking" ship, to keep out of the way, continued, although she had ceased to be within the area lighted by the sternlight, and had advanced into a position in which she could see the side light of the "overtaken" ship. THE MOLIÈRE - - 217

4. —— *Limitation of Liability—Owners the same of both Ships—Common Employment—Gross Tonnage—Crew Space—Merchant Shipping Act*, 1867 (30 & 31 *Vict. c.* 124), *s.* 9.] A collision occurred in the River Thames between two steamships, the *Petrel* and the *Cormorant*, belonging to the same owners, and the *Cormorant* sank, but there was no loss of life.—In an action brought by some of the owners of cargo on board the *Cormorant* against the *Petrel*, the latter vessel was found alone to blame. Thereupon the owners of the *Petrel* instituted proceedings for limiting their liability to 5658*l.* 5*s.* on 707·28 tons, being 8*l.* per ton on the gross tonnage of the *Petrel* without deduction of engine-room, but deducting 31·80 tons crew space under s. 9 of the Merchant Shipping Act, 1867, and, in respect of their claim for lost effects, making the master, officers, and crew of the *Cormorant* defendants with cargo owners and others.—On objection to the claim of the master, officers, and crew of the *Cormorant*, and to the deduction from the tonnage of the *Petrel* of the crew space:—*Held*, first, that the master, officers, and crew of the *Cormorant* were entitled to claim against the fund in respect of their lost effects, for, though they had a common employer with the master, officers, and crew of the *Petrel*, in the sense that both crews were making money for him, they were not in common employment in the sense that injury from the negligence of one crew was

COLLISION—*continued.*

an ordinary risk of the service of the other, for the safety of the crew of one of these two vessels did not depend on the skill and care of the crew of the other, more than on the skill and care of the crews of other vessels navigating the Thames.—Secondly, that, as the requirements of s. 9 of the Merchant Shipping Act, 1867, had been complied with, the plaintiffs, as owners of the *Petrel*—in calculating the tonnage upon which their statutory liability was based—were entitled to deduct the 31·80 tons crew space. THE PETREL [320

—— Damage—Principal action—Cross-action—Practice—Security - - 275
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COLLISION CLAUSE—"Sunken wreck" 248
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COSTS—Taxation—Attendance of country solicitor at trial in London - - 73
See PRACTICE. 2.

COUNTY COURT—*Prohibition—Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 34—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 132—*Practice—Tender—Alteration of Judgment as to Costs.*] By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16: ". . . there shall be transferred to and vested in the . . . High Court of Justice, the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by . . . (5.) The High Court of Admiralty;" and by s. 34, "There shall be assigned . . . to the Probate, Divorce, and Admiralty Division . . . all causes and matters which would have been within the exclusive cognizance of the . . . High Court of Admiralty. . ."—By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 132: "When the High Court, or a judge thereof, shall have refused to grant a writ of . . . prohibition to a court . . . no other Court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself . . ."—The plaintiff issued a plaint, on the Admiralty side of a county court, for damage by collision. The defendants denied their liability; but at the trial judgment was given for the plaintiff with costs, subject to a reference to the registrar to assess the damages. The defendants then paid into court, by way of tender, a sum which was found by the registrar to be sufficient to cover the damage. The judge thereupon rescinded so much of his judgment as dealt with the costs, and made a decree condemning the plaintiff in the costs of the action and of the reference.—The plaintiff applied to a judge of the Admiralty Division, who was sitting in chambers, in vacation, exercising the jurisdiction of all the divisions of the High Court, for a writ of prohibition in respect of so much of the decree as dealt with the costs of the action. The application was refused, and the judge did not desire any further argument.—The plaintiff appealed, and on objection to the jurisdiction:—*Held*, by the Court of Appeal (Lord Esher, M.R., Bowen and Kay, L.JJ.), first, that, by virtue of the Judicature Act, 1873, a judge of the Admiralty Division has all the powers, as to prohibition, of a judge of the High Court; secondly, that, as the judge did not require any further argument, the appeal, in an Admiralty cause, was direct to the Court of Appeal, notwithstanding s. 132 of the County Courts Act, 1888, which only applies to proceedings in the High Court, and prevents an application to another judge of the High Court or to another Divisional Court, when the first judge, or Divisional Court, has refused to grant the writ; thirdly, that tender, by way of defence to the action, could not properly be made after judgment determining the liability: and, fourthly, that the county court judge, having included an order as to costs in his judgment determining the liability, had no power to rescind that portion of it. THE RECEPTA - C. A. 255

COUNTY COURT—*continued.*

—— Appeal—Admiralty—Appeal from Divisional Court to Court of Appeal - 33
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DESPATCH MONEY—Time for discharge of cargo—Sundays and fête days excepted 269
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FIRE—Loss by fire—Memorandum in Lloyd's policy—"Free from average under 3 per cent., unless general, or the ship be . . . . burnt" - - - 164
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FOG—Regulations for preventing collisions at sea - - - - - 47
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FOREIGN SHIP—Contract made by foreigners for salvage of foreign ship in English waters—Non-payment of salvage—Place of payment - - - - 119
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GENERAL AVERAGE—Marine insurance—Chartered homeward freight—Foreign statement clause - - - 189
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INSURANCE, MARINE—*Charterparty—Chartered Freight—Damage by Fire—Want of Repair—Causa proxima—Order* XXXIV., *r.* 2.] By a charterparty the charterer agreed to pay the plaintiffs so much per month for the hire of their vessel, provided that "in the event of loss of time from . . . want of repairs . . . preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service."—By a policy effected with the defendants, the plaintiffs insured the "chartered freight" and the clause, enumerating the perils against which the assured were indemnified, was in the usual form, viz. "of the seas . . . fire . . . &c.—The plaintiffs' vessel was damaged by fire, and,

INSURANCE, MARINE—*continued.*
under the above clause in the charterparty, the payment of the hire ceased for the thirteen days occupied in repairs.—In an action brought by the plaintiffs on the policy to recover the amount so lost:—*Held*, that the defendants were liable, as the clause in the charterparty was put into operation through the immediate action of the perils insured against. THE ALPS - - 109

2. —— *Loss by Fire—Memorandum in Lloyd's Policy—"Free from Average under 3 per Cent., unless general, or the Ship be . . . burnt."*] A ship is "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt"—when the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is, pro tempore, incapable of being properly used for the purposes of her voyage—that is, when the ship is temporarily innavigable. THE GLENLIVET - - 164

3. —— *Chartered Homeward Freight—Foreign Statement Clause—General Average.*] The plaintiffs, who were owners of a vessel chartered to proceed to a port in the United States, as ordered at port of call, and there load a cargo for the United Kingdom or Continent, and deliver the same on being paid the agreed freight, effected with the defendant an insurance on "chartered homeward freight," the voyage being described in the policy as from Liverpool to Delaware Breakwater, and thence to New York or one other named port, and thence to any port in the United Kingdom or Continent within named limits, and general average was to be payable "as per foreign statement if required."—The plaintiffs' vessel left Liverpool in ballast, under the above charter, and two days afterwards, in consequence of heavy weather causing her tanks to leak, put into Holyhead without incurring expense in so doing; but at that place some expense was incurred, and, three days later, she returned to Liverpool, where further expenses were incurred in repairs, but none of the items of expenditure at Holyhead or Liverpool were incurred for the preservation of ship and freight. The vessel then sailed for Delaware Breakwater, where she received orders for Baltimore, to which port she proceeded, and there loaded, under the charter, a cargo which she delivered at Barrow. By an average statement, prepared in London, according to the alleged provisions of American law, general average charges in respect of the expenses incurred in Holyhead and Liverpool were shewn amounting to 186*l.* 6*s.* 5*d.*, including a sum of 154*l.* 3*s.* 8*d.* for wages and victualling of the crew whilst the vessel was at Holyhead and Liverpool. By the statement, the ship was made to bear 164*l.* 9*s.* 10*d.* of these charges, and the chartered freight (valued for the purposes of contribution at 1526*l.*) was made to bear 21*l.* 16*s.* 7*d.* In respect of the defendant's proportion (11*l.* 16*s.* 4*d.*) of this latter sum, the plaintiffs brought their action, alleging that a general average loss had arisen, which had been properly adjusted according to American law, and that the plaintiffs must be treated as having contributed to the loss on the basis of the statement:—*Held*, that, as the ship was under charter outward bound in ballast to load for the return voyage, and the only persons interested in the ship, and chartered freight, were the shipowners, the expenses in question were not a general average loss for which the defendant could be liable under the policy on chartered homeward freight, and, as there was no necessity for any foreign adjustment, the "foreign statement" clause had no effect. THE BRIGELLA 189

4. —— *Policy on Cargo—"Warranted free from Particular Average unless the Ship be stranded"—Cargo not on board at time of stranding."*] The plaintiffs effected, with the defendants, an insurance on a parcel of rice on a voyage from Calcutta to Demerara, or Barbadoes, in a named ship. The policy contained the common memorandum, by which rice is warranted free from average unless general or the ship be stranded, and a special memorandum by which the rice was "warranted free from particular average unless the ship be stranded . . . ."—The ship, which was chartered by the plaintiffs to carry a cargo of rice, including the parcel in question, was of French nationality. She encountered heavy weather, obliging her master to jettison some of the rice, and subsequently to put into the Mauritius for repairs. To effect these repairs the cargo was discharged, and part of it, including some of the rice in question, being damaged, was condemned as unfit to be forwarded and sold. Whilst the vessel was being repaired, and whilst the whole of the cargo was on shore, a cyclone burst over the island during which the vessel stranded, and was found to have sustained such damage that she was condemned and abandoned. The remainder of her cargo was subsequently shipped on board a British vessel, and after a portion of it, including some of the rice in question, had been, in the course of the voyage, damaged by sea perils, it was finally delivered at Barbadoes. Freight pro rata itineris was, according to French law, paid by the plaintiffs on all the rice discharged from the French vessel at Mauritius.—The defendants paid their proportion of general average and forwarding charges, but disputed the plaintiffs' claim for 153*l.* 13*s.* 3*d.* for a particular average loss on the rice sold at Mauritius, and on that subsequently damaged in the British vessel, including the pro rata freight charged against the rice:—*Held*, that the defendants were not liable, as the stranding took place at a time when the insured goods were not on board the vessel, and, therefore, the warranty against particular average remained in force. THE ALSACE LORRAINE - - - 209

5. —— *Collision Clause—"Sunken Wreck."*] By a policy of re-insurance effected by the plaintiffs with the defendant on the hull, machinery, &c., of a steamship, the risk covered was "loss or damage through collision with (inter alia) any . . . sunken . . . wreck . . ."—The steamship whilst entering Port Talbot ran aground, and on the tide falling, she was found to be resting amidships on the wreck of a steamer sunk more than a year before, and the ribs of which projected about a foot above the sand. She subsequently shifted her position about her own length further forward off the wreck and on to a bank of

INSURANCE, MARINE—*continued.*
iron ore, which, two or three years before, had formed part of the cargo of another vessel:—*Held*, that both the damage sustained by contact with the wreck, and by that with the iron ore, was "loss or damage through collision with sunken wreck," within the meaning of the clause in the policy. The Munroe - - - - - 248

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PRACTICE—*County Court—Appeal from Divisional Court to Court of Appeal—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*County Courts Act,* 1875 (38 & 39 *Vict. c.* 50), *s.* 10—*Rules of Supreme Court, Order* LIX., *r.* 4—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 188, *sub-s.* 5.] By s. 45 of the Judicature Act, 1873, appeals from county courts to a Divisional Court are to be final unless special leave to appeal to the Court of Appeal is given by the Divisional Court.—By s. 10 of the County Courts Act, 1875, no leave to appeal to Her Majesty in Council shall be necessary where the High Court of Admiralty "alters" the judgment of the County Court.—By Rules of Supreme Court, 1883, Order LIX., r. 4, Admiralty appeals from inferior courts shall be heard and determined by a Divisional Court of the Probate, Divorce, and Admiralty Division.—By s. 188 of the County Courts Act, 1888, the whole of the County Courts Act, 1875, is repealed; but by sub-s. 5 "this repeal shall not revive any enactment . . . not in force . . . at the commencement of the Act."—A county court in an Admiralty action gave judgment for the defendants.—A Divisional Court of the Probate, Divorce, and Admiralty Division, sitting in Admiralty, reversed the judgment and refused leave to appeal.—*Held*, by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), that as the judgment of the county court had been "altered" by the Divisional Court, the appeal could be heard without leave, for so much of s. 45 of the Judicature Act, 1873, as was inconsistent with s. 10 of the County Courts Act, 1875, was impliedly repealed by the latter Act, and therefore was "not in force" at the time of the repeal of the County Courts Act, 1875, by the County Courts Act, 1888. The Dart [C. A. 33

2. —— *Costs — Taxation — Attendance of Country Solicitor at Trial in London.*] The allowance, as between party and party, of the costs of the attendance of the country solicitor at a trial in London, is a matter for the discretion of the taxing master, and, in Admiralty actions, where the statements of the witnesses have been taken by the country solicitor, and the responsibility for the due collection of the evidence has rested with him, his presence may be necessary for the proper conduct of his client's case, and, if so, the costs of his attendance should be allowed. The Soto - - - - - 73

3. —— *Damage by Collision — Principal Cause—Cross Cause—Practice—Security—Admiralty Court Act,* 1861 (24 & 25 *Vict. c.* 10), *s.* 34.] By s. 34 of the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10): "The High Court of Admiralty may, on the application of the defendant in any cause of damage and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence, and, if, in the principal cause, the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause."—In a collision between the plaintiffs' and the defendants' steamers the former was damaged and the latter sunk. The plaintiffs issued a writ in personam against the defendants. The defendants issued a writ in rem against the plaintiffs' vessel, and bail was given by the plaintiffs to prevent her arrest. The two actions were consolidated, and the defendants were made counter-claimants. The plaintiffs applied for security to be given by the defendants:—*Held*, that there was no power under s. 34 of the Act of 1861 to grant the application. The Rougemont - - 275

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SALVAGE—*Agreement to Tow—Extra Premium paid for Deviation — Effect on Amount and Apportionment of Award.*] A large steamer valued, with cargo and freight, at between 134,600*l.* and 155,170*l.*, fell in with a disabled steamer in the Atlantic valued, with cargo and freight, at 90,000*l.*, and, in five and a half days, successfully towed her to Halifax, a distance of 340 miles. Before the towage commenced the following agreement was signed: "It is this day mutually agreed between (the masters of the two vessels) that the (disabled steamer) shall be

SALVAGE—*continued.*
towed into port, if possible, by the (salving steamer), and whatever services are rendered, and loss of time, shall be settled between (the respective owners)." By reason of the salvage services, the owners of the salving vessel (amongst other expenses), paid the sum of 342*l.* extra premium to their underwriters to waive the breach of warranty against British North American ports at that season of the year. In making an award to the owners, master and crew of the salving vessel, of 5350*l.*, and apportioning 4225*l.* to the owners, the Court:—*Held*, that as the agreement might be construed to entitle the salvors to some remuneration even if their services were unsuccessful, it must be taken into account as an element reducing the award; on the other hand, the extra premium paid for deviating to Halifax must be considered as an element increasing the proportion of the award to which the owners were entitled. The Edenmore - - 79

2. —— *Practice—Contract made by Foreigners for Salvage of Foreign Ship in English waters—Non-payment of Salvage—Place of Payment—Lien on Ship and Cargo—Service out of the Jurisdiction—Rules of the Supreme Court,* 1883, *Order XI., r.* 1 (*e*).] By Order XI., r. 1: "Service out of the jurisdiction of . . . . notice of a writ of summons may be allowed . . . . whenever (*e*) the action is founded on any . . . . alleged breach within the jurisdiction of any contract, whenever made, which, according to the terms thereof, ought to be performed within the jurisdiction. . . . ." A foreign ship, owned by the defendants, a German company carrying on the business of shipowners in Germany, stranded within the three-mile limit on the English coast. Her master, a German, entered into a contract, in the German language, with the plaintiffs, a Swedish salvage company, and also with a German salvage company, by which these two salvage companies jointly undertook to do their best to salve the ship, and her cargo, and convey them to a neighbouring English port, "against a salvage reward, or compensation, of 50 per cent." of the value of the property in the salved condition. In case of disagreement, the value was to be determined by arbitration, and the salvage money was to be paid, within ten days after the salvage had been effected, to the German salvage company, who were to have a lien on ship, and cargo, until payment, but no place of payment was specified. The ship was floated, and together with a great part of her cargo, conveyed to the named English port. The salvage on the cargo was paid, but the parties disagreed as to the valuation of the ship, and the amount was determined by arbitration. The plaintiffs obtained leave, ex parte, to serve the defendants, out of the jurisdiction, with notice of a writ of summons, in an action in the Admiralty Division, for a moiety of the 50 per cent. of the value as determined by arbitration; but, after argument, the President discharged the order, and set aside the writ of summons. The plaintiffs appealed:—*Held*, by the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.), that the decision of the President must be affirmed, as there was no obligation to pay the salvage money within the jurisdiction, and therefore no breach within the meaning of Order XI., r. 1 (*e*). The Eider - **C. A. 119**

3. —— *Apportionment — Classification of Salvors — Non-navigating portion of Crew — Surgeon, Stewards, &c.*] A large steamer fell in, in the Atlantic, with another large steamer, disabled by the breaking of her propeller shaft, and successfully brought her into port, after a towage of 757 miles, lasting five days. The owners of the disabled steamer settled the claim of the salving steamer by the payment of 12,000*l.*, and the owners, master, and crew of the salving steamer applied to the Court to apportion this sum. Of the fifty-nine persons, composing the crew of the salving steamer, there were eleven non-navigating members, viz., the surgeon, four stewards, stewardess, two cooks, baker, and two cabin boys, who took no active part in rendering assistance to the disabled steamer. In apportioning the above sum, and awarding 9200*l.* to the owners, 800*l.* to the master, and the remaining 2000*l.* to the crew according to their rating, the Court:—*Held*, that the non-navigating members of the crew above specified were only entitled to a half-share according to their ratings. The Spree - - - - - 147

4. —— *Contract to Tow — Risk to Tug — Danger to Tow—Conditions required before Salvage engrafted on Towage.*] The plaintiffs' tug was engaged, for a fixed sum, to tow from sea, and dock the defendants' ship.—Whilst the plaintiffs' tug was, under the direction of the pilot, turning the ship round, in order to enter the dock stern first, the tow-rope of another tug fast on the ship's quarter parted, and, through the effect of the wind and tide, the ship touched the ground. The plaintiffs' tug, by the direction of the pilot, then shifted her position, and proceeded to tow the ship into dock bow first. In so doing the ship came off.—The plaintiffs claimed salvage remuneration, alleging that their tug had rescued the defendants' ship from a position of danger:—*Held*, that the plaintiffs were not entitled to salvage remuneration, as the ship was not in any immediate danger, and the tug had not run any risk or performed any duty or rendered any services beyond what, in the contemplation of the parties, was reasonably to be expected of her during the continuance of the towage contract.—The conditions required to engraft salvage on towage considered. The Liverpool - - - - - 154

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